UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAM PRODUCTIONS, LTD. and EVENT PRODUCTIONS, INC.

and Case No. 13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION LOCAL NO. 2, IATSE

RESPONDENTS' BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:

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I. STATEMENT OF THE CASE

This case was tried on a Stipulated Record. Theatrical Stage Employees Union Local No. 2 IATSE (the "Union") and the General Counsel allege that Respondents Jam Productions, Ltd. and Event Productions, Inc. breached a settlement agreement in a prior Board proceeding by failing to give "seniority" status to the 44 part-time stagehands covered by the settlement. But the Settlement Agreement did not require that the stagehands be given seniority or any other rights and/or privileges. To the contrary, during the settlement negotiations, Jam repeatedly rejected the Region's demand that the stagehands be given seniority or other preferential rights. The Region ultimately dropped its seniority and other rights and/or privileges demand, and the Settlement Agreement contains no such requirement. Rather, Jam's only obligation was to offer the covered stagehands "immediate and full *participation in the on-call* list without discrimination because of their Union membership or support for the Union, and offer them work in a non-discriminatory manner," which is exactly what Jam did.[1]

This final, operative language from the Settlement Agreement was the product of extensive negotiations in which the Region initially proposed "[1] immediate and full *reinstatement to* [the employees'] *former jobs and* [2] restore their names to the work assignment roster [3] in accordance *with seniority* ... [4] *without prejudice to their seniority or any other rights and/or privileges previously enjoyed*" and did not include a non-admission clause. During negotiations, Jam rejected each of these provisions and insisted on a non-admission clause. Jam rejected the proposed provisions that would have required "reinstatement to former jobs," "seniority" and "other rights and/or privileges" provisions, and Jam repeatedly informed the Region that it would continue to employ the current (replacement) stagehands along with the returning stagehands, and

[1] Both Respondents will be referred to as "Jam" for simplicity. Respondents signed the settlement agreement on March 28, 2016 ("Settlement Agreement"). (*See* JX Ex. 18.)

that the returning stagehands would not have any seniority or other rights and privileges. After exhaustive back and forth negotiations, the Region and Jam agreed to the above-quoted language from the settlement agreement ("immediate and full *participation in the on-call list* without discrimination ...and offer them work in a non-discriminatory manner"), and the Region dropped its demand that the returning stagehands be reinstated with seniority and other privileges. The Union refused to sign the Settlement Agreement because it did not require termination of the replacements and because it did not include seniority rights for the returning stage hands. So, the Region settled unilaterally.

Notwithstanding that all of these facts were stipulated, the ALJ ignored them, choosing instead to fashion a ruling and remedy that neither party had sought. Despite the unambiguous terms of the Settlement Agreement, and the Stipulated Record confirming that the Region *deliberately* dropped its proposed seniority and reinstatement to former jobs provisions in order to reach a settlement, the ALJ held there was no "meeting of the minds" on the issue of "seniority" and set aside the Settlement Agreement, which had been fully-negotiated, signed, approved, paid and implemented. But none of the parties had argued to the ALJ there was no meeting of the minds. The ALJ violated Jam's due process rights in finding there was no meeting of the minds and hence no agreement because this was not among the allegations in the complaint or the charge that had been issued against Jam.

Jam entered into the Settlement Agreement to avoid the costs, burdens and risks of litigation. Jam honored the Settlement Agreement by paying the required back-pay and offering the stagehands "full participation in the on-call list." By setting aside the Settlement Agreement (more than a year after its full implementation), the ALJ has put Jam in an untenable position. The Region and the reinstated stagehands have received the full benefit of the Settlement Agreement

(back-pay and full participation in the on-call list), while Jam has to spend resources litigating the previous charges that the parties had settled.

While the Region may now regret dropping its initial demands that the returning stagehands be reinstated to their former jobs with seniority, it knew exactly what it was doing when it settled the prior proceeding without requiring that the stagehands be reinstated with seniority. The ALJ may not agree with the Region's decision to settle the prior proceeding without any reinstatement or seniority requirement, but his job was to enforce the terms of the Settlement Agreement, not to implement labor policy or give effect to the Union's objections to the Settlement Agreement. This heads I win, tails you lose result in favor of the Region is contrary to the stipulated facts and applicable law regarding the enforcement of settlement agreements.

The Board should grant the exceptions, overrule the ALJ's rulings, findings and conclusions, and dismiss the complaint.

II. QUESTIONS INVOLVED

Respondents have taken exceptions to the Administrative Law Judge's Decision ("ALJD") that raise the following principal issues:

1. Is the ALJ's finding and conclusion that there was no meeting of the minds and therefore no agreement to settle the underlying case in Case No. 13-CA-160319 contrary to the stipulated evidence and established law? Exceptions 1, 19, 24.

2. Did the ALJ's sua sponte finding and conclusion referred to in Issue 1 violate Respondents' due process rights by depriving them of notice and an opportunity to be heard because this was not among the allegations in the complaint or the charge that had been issued against Respondents (which alleged that Respondents breached the Settlement Agreement the ALJ found does not exist), when all parties agreed there was a valid and enforceable Settlement

Agreement and the only matter in dispute was whether Respondents had complied with the Settlement Agreement? Exceptions 2, 19.

3. Is the ALJ's finding, analysis and conclusion and framing of the issue that "[t]he primary issue in this case is whether the phrase 'immediate and full participation in the on-call list' required a return to the status quo ante, thus giving the 55 stagehands seniority or other preference over the stagehands who replaced them, or simply the right to be offered work assignments equally with their replacements" (ALJD 1, 1st paragraph (lines unnumbered)), misleading, inaccurate and incomplete, and contrary to the established law and the stipulated evidence showing that (i) Respondents explicitly and repeatedly rejected the General Counsel's settlement demands that the Shaw Crew be reinstated to their former jobs and be given seniority; (ii) the Region dropped its demands for reinstatement and seniority; (iii) the Settlement Agreement contained no such requirements; and (iv) the Union refused to sign the agreement because it did not reinstate the Shaw Crew with seniority and other privileges? Exceptions 8 and 10.

4. Is the ALJ's finding that "Initially, Region 13 proposed that the Shaw Crew be offered 'immediate and full participation in the on-call list without discrimination because of their union membership or support for the Union and without prejudice to their seniority or any other rights and/or privileges previously enjoyed'" (ALJD 4:18-21) contrary to the stipulated evidence that the Region's and General Counsel's initial settlement proposal was for "[1] *immediate and full reinstatement to* [the alleged discriminatees'] *former jobs and* [2] *restore their names to the work assignment roster* [3] in accordance *with seniority* ... [4] *without prejudice to their seniority or any other rights and/or privileges previously enjoyed*"? Exceptions 9 and 10.

5. Is the ALJ's finding, analysis and conclusion and framing of the issue that "[t]he resolution of the unfair labor practice allegations depends on an interpretation as to what the General Counsel and Respondents intended by the 'immediate and full participation in the on-call list' by

Shaw Crew employees in the settlement agreement in Case 13-CA- 160319" contrary to the stipulated evidence showing that (i) Respondents explicitly and repeatedly rejected the General Counsel's settlement demands that the Shaw Crew be reinstated to their former jobs and be given seniority; (ii) the Region dropped its demands for reinstatement and seniority; (iii) the Settlement Agreement contained no such requirements; and (iv) the Union refused to sign the agreement because it did not reinstate the Shaw Crew with seniority and other privileges? Exception 14.

6. Is the ALJ's finding, analysis and conclusion that "the parties reasonably disagree as to whether 'immediate and full participation in the on-call list' requires a return to the on-call list previously used for the Shaw Crew or simply inclusion into an on-call list with the New Riviera Crew. As it relates to 'seniority and any other rights and/or privileges previously enjoyed' by Shaw Crew employees, the phrase is silent and thus unclear or susceptible of more than one interpretation" and that the agreement is ambiguous (ALJD 7:18-23) contrary to the established law and the stipulated evidence showing that (i) Respondents explicitly and repeatedly rejected the General Counsel's settlement demands that the Shaw Crew be reinstated to their former jobs and be given seniority; (ii) the Region dropped its demands for reinstatement and seniority; (iii) the Settlement Agreement contained no such requirements; and (iv) the Union refused to sign the agreement because it did not reinstate the Shaw Crew with seniority and other privileges? Exception 16.

7. Is the ALJ's finding, analysis and conclusion that "[t]he extrinsic evidence in this record, however, is inconclusive as to what the parties intended in the settlement agreement. Respondents rely on the General Counsel's inclusion of seniority language in the initial draft of the settlement agreement and its removal from the final version of the agreement, over the Union's objection, after Respondents rejected that language. On the other hand, there is evidence that the

General Counsel, in responding to the Union's objection, expressed his opinion that the final version of the settlement agreement preserved the Shaw Crew's seniority rights notwithstanding the omission of specific language to that effect." (ALJD 7:28-34) contrary to the established law and stipulated evidence showing that (i) Respondents explicitly and repeatedly rejected the General Counsel's settlement demands that the Shaw Crew be reinstated to their former jobs and be given seniority; (ii) the Region dropped its demands for reinstatement and seniority; (iii) the Settlement Agreement contained no such requirements; (iv) the Union refused to sign the agreement because it did not reinstate the Shaw Crew with seniority and other privileges; and (v) the General Counsel's after-the-fact email to the Union was not communicated to or shared with Respondents? Exception 17.

8. Are the ALJ's findings and conclusions that the settlement agreement required Respondents to "reinstate" 55 stagehands from the Shaw Crew (ALJD 1, 1st paragraph (lines unnumbered)), that Respondents proposed and agreed to the "reinstatement and recall" of the Shaw Crew (ALJD 4:24-26), that the final Settlement Agreement included "reinstatement" (ALJD 5:13), contrary to the stipulated evidence showing that (i) Respondents explicitly and repeatedly rejected the General Counsel's settlement demands that the Shaw Crew be reinstated to their former jobs and be given seniority; (ii) the Region dropped its demands for reinstatement and seniority; (iii) the Settlement Agreement contained no such requirements; and (iv) the Union refused to sign the agreement because it did not reinstate the Shaw Crew with seniority and other privileges? Exceptions 7, 11.

9. Is the ALJ's finding, analysis and conclusion that "[t]he patent ambiguity of the requirement that Respondents provide the Shaw Crew with 'immediate and full participation in the on-call list' is further evident from the agreement to make whole the Shaw Crew employees for the entire back-pay period, while omitting any reference to the rights of the New Riviera Crew

that replaced the Shaw Crew members during that period. Indeed, the settlement agreement fails to mention the New Riviera Crew in any way." (ALJD 7:36-40) contrary to established law, logic and the stipulated evidence showing that the settlement agreement was the product of extensive negotiations and that the final Settlement Agreement was a compromise in which the General Counsel obtained some of what it wanted (backpay), Respondents obtained some of what they wanted (retaining the New Crew and not granting seniority or other preference to the Shaw Crew), and the Union refused to sign the settlement agreement specifically because the New Crew would not be discharged and because the Shaw Crew would not be given seniority or any other preference? Exception 18.

10. Is the ALJ's recommendation that the Board set aside the settlement in Case 13-CA-160319, reinstate those allegations, and remand that case to the Division of Judges for a trial of both the reinstated allegations and those in the instant complaint, and to make the necessary findings, analysis, and conclusions of law (ALJD 7:45-8:1) contrary to established law, logic, the Settlement Agreement and the stipulated evidence? Exceptions 20, 25, 26.

11. Is the ALJ's finding that Shaw usually called crew members in order of seniority, with few exceptions, contrary to the stipulated evidence showing that Shaw had not called crew members by seniority? Exception 3.

12. Is the ALJ's finding that the Shaw Crew received fewer offers to work under Emami than they had received under Shaw (ALJD 5:34-42) contrary to the stipulated evidence showing that (i) the size of the crew under Emami shrank to 9 stagehands from the 14 under Shaw and (ii) the pool of stagehands from which Emami selected stagehands (47 people) was more than twice as large as the pool of most active stagehands in the Shaw Crew (22 people)? Exception 13.

13. Is the ALJ's "Conclusion of Law" No. 5 that beginning April 7, 2016, Respondents offered work equally to the Shaw Crew and New Crew contrary to the stipulated evidence showing

that Respondents made more offers of work to the Shaw Crew members even though they constituted less than half of the combined crew consisting of the active Shaw Crew members and New Crew members?

14. Is the ALJ's finding that the Shaw Crew members received "significantly" less work than before they were discharged (ALJD 8:33-36) contrary to the stipulated evidence showing that the size of the crew after the settlement was reduced to 9 individuals from the 14 before the Shaw Crew was discharged, which meant that members of the Shaw Crew would have received 36% less work under Emami even if the New Crew had not existed? Exception 23.

15. Does the stipulated evidence and established law require a finding and conclusion that Respondents complied with the settlement agreement and the National Labor Relations Act? Exception 27.

16. Does the stipulated evidence and established law require findings and conclusions that (i) under the Settlement Agreement Respondents were not required to discharge the New Crew or give the Shaw Crew seniority or other preferences over the New Crew, (ii) Respondents complied with the operative provision of the Settlement Agreement that the Shaw Crew be offered "immediate and full participation in the on-call list ... without discrimination because of their union membership or support for the Union," (iii) Respondents offered more work opportunities to the Shaw Crew members (54% of the work offers) than to the New Crew members, even though the Shaw Crew members constituted just 47% of the combined crew, (iv) that Shaw Crew members filled more of the more desirable all-day jobs than would have been expected by random selection and the same number of total slots as expected on a random basis, (v) that Respondents offered Shaw's four main stagehands more work opportunities than would have been expected by random selection, and (vi) Respondents were not required to offer the Shaw Crew members the same

amount of work as before the discharge but only to treat them without discrimination? Exception 28.

17. Does the stipulated evidence and established law require a finding and conclusion that the General Counsel failed to carry his burden of proving discrimination against the Shaw Crew members? Exception 29.

II. FACTS

A. The Employer's Business

Jam Productions, Ltd. ("Jam") located in Chicago, Illinois, is engaged in the business of promoting and producing concerts and events ("shows") at venues, including the Riviera Theatre, Park West Theatre, and Vic Theatre in Chicago, Illinois. (Joint Motion & Stipulation of Facts ("Stip.") ¶ 2.) Event Productions, Inc. provides labor for shows at the Riviera and Vic theatres, including stagehands, who are part-time employees. (Stip. ¶¶ 3, 8.) The stagehands "load in" equipment and material from the band and vendors to the venue before the show, and "load out" those items after the show ends. Stagehands are assigned the "load-in" and/or the "load-out," or assigned "all day" as needed to, for example, change set-ups if multiple bands perform. The size of the stagehand crew for a particular show varies depending upon the scope of work for the show. This case involves the stagehands who worked at the Riviera Theatre. The 35 timesheets in the record covering all shows at the Riviera from April 9, 2016 to December 30, 2016, reflect a median stagehand crew size of nine per show during this period. (JX 28.)

B. The Shaw Crew

Prior to September 16, 2015, the Riviera Theatre employed Kevin Lynch ("Lynch") as production manager and Chris "Jolly Roger" Shaw ("Shaw") as a part-time crew manager for the stagehands. Stip. ¶ 31. Shaw reported to Lynch and/or Nick Miller (the head talent buyer). Stip. ¶ 31. For each show, Lynch would let Shaw know how many stagehands were needed (Stip. ¶ 28,

JX 25), and Shaw was responsible for offering and assigning work to the stagehands. (Stip. ¶ 31.) Neither Jam nor Event Productions authorized or requested Shaw to use a seniority system for stagehands or to provide stagehands with any privileges based on length of service. (Stip. ¶ 31.)[2]

On September 16, 2015, Jam discharged Lynch, Shaw, and the Shaw Crew. (Stip. ¶ 10.) The *following* day, the Union filed a petition with Region 13 to represent the regular part-time stagehands at the Riviera Theatre, Vic Theatre, and Park West Theatre. (Stip. ¶ 11; JX 2.) On September 18, 2015, the Union filed an unfair labor practice charge alleging that Jam had discharged the Shaw Crew in retaliation for their protected activity. (Stip. ¶ 12; JX 3.) The General Counsel filed a complaint based on the allegations in the unfair labor practice charge. (Case No. 13-CA-160319; JX 4.) Jam denied the allegations of the complaint.

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[2] While Shaw apparently would testify that he called his crew in order of seniority (Stip. ¶ 28, JX 25), the undisputed evidence from Shaw's own records is that Shaw actually did not call his crew in order of seniority. Chart 1 in the attached Appendix lists the individuals on the Shaw Crew identified by name in the Settlement Agreement (JX 5), showing their hire date and the number of shows they worked from September 22, 2014 to September 21, 2015, the one-year period preceding their discharge. (Chart 1 is compiled from information in Joint Exhibits 33 and 26.) Chart 1 shows that except for Shaw's four favorite stagehands, Gregor Kramer, Paul Repar, Archie Yumping and Justin Huffman (*see* JX 25, pp. 2, 10-11), Shaw did not assign work to stagehands based on their hire dates. Chart 1 shows that Shaw's four favorite stagehands worked from 36 shows (Yumping) to 60 shows (Kramer) during this period. But other more recently-hired stagehands also worked a high number of shows, such as Gabe Thompson (47 shows, hired May 13, 2011), Ed Bilicki (46 shows, hired November 4, 2011), and Chris Leggett (34 shows, hired September 28, 2013) while Shaw assigned many of the longest-tenured stagehands only a handful of shows, such as Joe Kelly (4 shows, hired June 30, 2002), Eric Pospishil (6 shows, hired November 2, 2003), Joe Lyons (2 shows, hired September 27, 2006), and Sean Gunn (6 shows, hired October 30, 2010). On September 30, 2015, the Employer and the Union entered into a Stipulated Election Agreement. The stipulated voter list also belies the notion that Shaw made work assignments based on seniority. The parties stipulated that to be a "regular part-timer" and eligible to vote, members of the Shaw Crew had to have worked 18 or more shows over the one year period immediately preceding the payroll date ending October 4, 2015 (the "Prior One-Year Period"). Stipulated Election Agreement, p. 2. Chart 2 in the Appendix shows that there were stagehands on the Shaw Crew with more seniority who did not work at least 18 shows (and, therefore, were not eligible to vote), while there were stagehands with less seniority who worked 18 or more shows (and, therefore, were eligible to vote). At no time did the Employer authorize a seniority system for stagehands (Stip. ¶ 31), and there was and is no seniority system in practice.

C. The New Crew

On September 22, 2015, Behrad Emami ("Emami") replaced Lynch and Shaw at the Riviera Theatre. Emami was the new production manager but he also assumed responsibilities for offering and assigning work to stagehands. Emami has worked for Event Productions since approximately 2004, ultimately advancing to production manager in other venues, and he also had been a production coordinator and road manager for various artists' tours. (JX 24, p 1.) Emami and the production manager at the Vic Theatre, Jason Plahutnik, created a list of stagehands from people they knew and worked with at area venues, and from their network of industry contacts. (Stip. ¶ 32; JX 24, p 2.) Emami started with a list of 25 to 30 stagehands, and added and dropped names from the list over time. (JX 24, pp. 2-3.) Emami knew that some of the Shaw Crew continued to work shows for Event Productions at other locations, and he initially began calling a few stagehands who had been members of the Shaw Crew. (JX 24, pp. 3-4.) However, Emami soon learned from members of the Shaw Crew that a legal matter was pending and that members of the Shaw Crew would not work at the Riviera Theatre until the matter was resolved. (JX 24, p 3.)

Emami produced his first show at the Riviera on September 25, 2015, and assembled a crew of stagehands to work at this show. The same stagehands continued to work shows at the Riviera, and Plahutnik and Emami continued to develop the list of stagehands for the Riviera. Within a few weeks Emami "felt we had a good core group of employees." (JX 24, p.3.)

It is critically important to keep the touring crews and their managements happy, because otherwise they can take their shows to another promoter and venue in the future. During the next six months, from late September 2015 to late March 2016, Emami was "very satisfied" with his crew and its performance. He received positive feedback from multiple touring crews and management regarding their experience at the Riviera. (JX 24, p 4.)

D. The Region Seeks a Return to the Status Quo Settlement

On December 4, 2015 the Region sent its initial settlement proposal to Jam. (JX 7.) It proposed "[1] *immediate and full reinstatement to* [the alleged discriminatees'] *former jobs and* [2] *restore their names to the work assignment roster* [3] in accordance *with seniority* ... [4] *without prejudice to their seniority or any other rights and/or privileges previously enjoyed.*" (JX 7, R.53, 1st "We Will.") The initial proposal also proposed that Jam recognize and bargain with the Union (R.53-54) and did not include a non-admission clause. Jam did not accept this proposal.

On January 14, 2016, after issuance of the Complaint challenging the discharge of the Shaw crew, the Region sent its second settlement proposal. (JX 8.) It contained the same terms as the initial proposal. Jam did not accept this proposal.

On February 1, 2016, the Region sent a revised proposal (its third proposal), once again proposing that the alleged discriminatees be offered "[1] *immediate and full reinstatement* to their *former jobs* and [2] *restore their names to the work assignment roster* [3] *in accordance with seniority* ..., [4] *without prejudice to their seniority or any other rights and/or privileges previously enjoyed.*" (JX 9, R.68, 1st "We Will" (emphasis added).) The February 1 proposal added even more seniority rights in a new additional "We Will": "WE WILL [1] *assign* the [alleged discriminatees] who accept reinstatement *to work* at [any venue] [2] in a *nondiscriminatory* manner and [3] consistent with their *seniority.*" (JX9, R.69, last "We Will" (emphasis added).) Jam did not accept this proposal.

E. Jam Rejects a Return to the Status Quo Settlement, and Refuses to Discharge the New Crew or to Give the Shaw Crew Any Seniority or Preferential Treatment Over the New Crew

On February 2, 2016, Jam's counsel met with the Region and the Union's counsel to address settlement. (JX9, R.64; JX 11, R.99.) Jam's counsel explained to all that *Jam would not agree to discharge the New Crew or* to give the Shaw Crew any *seniority or preferential treatment*

over the New Crew (Stip. ¶ 17) because Emami assigned work based on skill, work ethic and ability to work well with others and did not use seniority or other preferences. (JX 24, p. 5).

On February 5, 2016, Jam sent a settlement counteroffer to the Region. (JX 10.) In place of the Region's proposal for "immediate and full *reinstatement* to their *former jobs*" and "restor[ing] their names to the *work assignment roster*" "in accordance with *seniority*" and "without prejudice to their *seniority,*" Jam proposed "immediate and full participation *in the on-call list* without discrimination because of protected activity under the Act and without prejudice to their rights and/or privileges, if any, previously enjoyed," thus deleting "*reinstatement to their former jobs*," "restore their names to the *work assignment roster*," "in accordance with *seniority*" and "*without prejudice to their seniority.*" This proposal also deleted "seniority" from the last We Will, which was changed to "[1] assign the [alleged discriminatees] who accept reinstatement to work at [any venue] [2] by restoring their names *to the on-call list* and [3] offering them work *in a nondiscriminatory manner* [4] in accordance with their skill sets." (*Id.*)

On February 9, 2016, the Region agreed to Jam's deletion of "*reinstatement to their former jobs*" from the first We Will, but rejected Jam's deletion of the Region's proposed seniority requirement. (JX 11, R 99 (2/9/16 email from Region to Jam) (emphasis added).) Specifically, the Region stated: "Respondent proposed to delete references to reinstatement of seniority rights ....As explained during our meeting, the restoration of any existing seniority rights *returns employees to the status quo* and is *necessary* to make employees whole." (*Id.*)

On February 24, 2016, Jam sent a revised agreement to the Region. JX 13. Jam again proposed to delete the Region's proposed requirement that the Shaw Crew be given "seniority, rights and/or privileges previously enjoyed", and again countered that it would offer "immediate and full participation in the on-call list ... without discrimination because of their Union membership or support for the Union." (*Id.*, R.115.)

On March 3, 2016, the Region sent another settlement proposal. (JX 12.) It proposed yet again to add "*seniority, rights and/or privileges enjoyed*" for the Shaw Crew (adding: "and without prejudice to their seniority, rights and/or privileges enjoyed, if any."). And the Region also reinserted a revised last We Will: "We Will *restore* the [alleged discriminatees] to the on-call list … and will offer them work in a nondiscriminatory manner." (*Id.*) Jam did not accept this proposal.

On March 4, 2016, the Region filed a Second Amended Complaint ("SAC") in the discharge case. (JX 4.) The SAC sought as part of the "Remedy" that Jam be required to "immediately *reinstate* all [alleged discriminatees] *to their former positions* without any loss in *seniority* and benefits and make [them] whole for any lost wages." (JX 4, p. 4.)

On March 11, 2016, the Region sent another settlement proposal to Jam. (JX 6.) This proposal would have required "[1] immediate and full *participation in the on-call list, …* [2] *without discrimination* because of their Union membership or support for the Union and [3] and without prejudice to their *seniority* or *any other rights and/or privileges* previously enjoyed, if any" (*Id.*, R.141, 1st We Will (emphasis added).) Jam did not accept this proposal.

F. The Division of Operations-Management Orders the Regions to Redouble Efforts to Settle Unfair Labor Practice Cases As Early As Possible

On March 9, the Office of the General Counsel, Division of Operations-Management sent a memorandum to all Regional Directors et al. re: *Casehandling Cost Savings Instructions for Remainder of Fiscal Year 2016.* Memorandum OM-16-09 (March 9, 2016), available at www.nlrb.gov/search/all/memorandum%20om-16-09 (copy attached as Appendix 4). This memorandum stated that the agency is facing a significant budget deficit for FY 16 and directed all Regional Offices to *redouble efforts to settle ULP cases* and to do so *as early as possible* to achieve the greatest savings: "Accordingly, in all Regional Offices, … *redoubled efforts should be made to resolve cases*" (p. 1) (emphasis added), and cases should be tried only after "*exhaustive settlement efforts*" (p. 2) (emphasis added).

G. The Region Drops Its Demand for a Status Quo Settlement and Accepts Jam's Proposal to Add the Shaw Crew to the On-Call List Without Discrimination Because of their Union Activities

On March 15, Jam sent a counterproposal to the Region. (JX 14.) It deleted the seniority and other rights and privileges language from the Region's proposals; instead it provided simply that Jam will offer "immediate and full participation in the on-call list ... without discrimination because of their Union membership or support for the Union." (R.154, 1st We Will.)

The very next day, the Region accepted Jam's March 15 offer, without any reservation: "Enclosed is the newly revised settlement agreement and notice for the above-captioned case. The Region made the revisions as proposed." (JX 15, R.163.) In response to an email from Jam's counsel seeking confirmation "there were no changes," counsel for the Region responded "Yes the Region agreed with all your changes as proposed." JX. 16, R 175. Thus, the Stipulated Record confirms that there was a clear meeting of the minds. The Region agreed to settle the case without any requirement that the stagehands be given seniority or any other rights and/or privileges previously enjoyed.

Jam signed the Settlement Agreement on March 28, 2016 (JX 18) and immediately took steps to implement it. That same day, Jam's Chairman, Vice President and Secretary, Jerry Michelson, sent a memo to Emami implementing the settlement. JX 19.

Mickelson's contemporaneous memo makes it clear that the on-call list included both the New Crew and the Shaw Crew and that Emami should offer the members of the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the [Riviera] from October 4, 2014 to September 21, 2015 without discrimination because of their Union membership or support for the Union, and offer them work in a non-discriminatory manner" [tracking the language of the settlement agreement, and omitting any mention of seniority or other rights and privileges]. Mickelson's memo explained:

> To be clear, you may hire whomever you think is best and appropriate for jobs. But Union support or membership, or lack of support or membership in the Union, may not play *any* role—NONE—in the hiring decisions you make. *And* you have to give fair consideration to [Shaw's] former crew. No doubt you have people whom you are now using whom you know and trust. But in order to be fair to [Shaw's] former crew, I want you to make sure to give people a chance—especially people who were most active at the Riv.

(JX 19 (emphases in original).) Mickelson also directed Emami to keep a log of every offer of work (showing date the offer was made, name of person to whom offer was made, date of the work that was offered, and response to the offer). (*Id.*)

H. The Union Objects to the Settlement and Refuses to Sign Because It Does Not Include Seniority Rights and Does Not Require the Discharge of the New Crew. The Region Proceeds With a Unilateral Settlement

On April 4, 2016—*i.e.*, *after* the Region had already accepted Jam's settlement offer and after Jam signed the Settlement Agreement and began implementing it—counsel for the Union sent the Region an email objecting to the settlement, specifically the inclusion of a non-admission clause and failure to provide the Shaw Crew with seniority rights. (JX 20.) This objection was not sent to Jam. The Union explained it objected to the non-admission clause because it would allow the New Crew to continue working and vote in the representation election, allegedly allowing Jam to "pack the unit" with hand-chosen replacements who will oppose the organizing drive, "giving Jam a heavy thumb on the scale in the upcoming representation election." And the Union objected to the omission of seniority and other rights the alleged discriminatees allegedly previously enjoyed. (*Id.*)

That same day (April 4, 2016) the Region's counsel sent an email response to the Union's counsel—*but without copying Jam.*[3] (JX 21.) Despite the fact that Jam had explicitly and repeatedly refused the Region's demand for seniority and that the Region had withdrawn its

[3] The Region did not produce the April 4, 2016 emails between the Region and the Union until almost a year later, on February 23, 2017—in the course of compiling the Stipulated Record in this case. (Stip. ¶ 21.)

demand for seniority in order to reach a settlement, the Region's counsel told the Union that the Union's concern about seniority "is already implicitly addressed by that clause in which the Employer agrees to offer the alleged discriminatees work in a non-discriminatory manner." (JX 21.) It is unclear what the Region's counsel intended to accomplish by misstating the terms of the Settlement Agreement to the Union's counsel or by not communicating his after-the-fact "re-interpretation" to Jam. But, regardless of what the Region's counsel secretly communicated to the Union's counsel, the Stipulated Record confirms the Region understood that (i) during the extensive settlement discussions Jam had repeatedly refused to terminate the New Crew or to give any seniority or privileges to the Shaw Crew; (ii) that the Region dropped its demand that the Shaw Crew be reinstated with seniority and other privileges over the New Crew; and (iii) that the Settlement Agreement contained no such requirements.

Regardless, the Union did not buy the Regional Director's argument (because it was contrary to the terms of the Settlement Agreement and negotiations) and the Union refused to sign the settlement without the seniority language. On April 6, 2016 – over the Union's objection – the Region signed the Settlement Agreement as proposed by Jam as a unilateral settlement. (JX 5.) On April 7 the Region emailed Jam notifying it that the settlement had been approved by the Regional Director. (JX 22, R.00204.)

I. The Shaw Crew is Restored to the On-Call List

In addition to receiving Mickelson's memo instructing compliance with the settlement agreement, Emami was provided a list of the stagehands included in the Settlement Agreement, identifying the "most active" members of the Shaw Crew (the "regular part-timers" who the parties

had stipulated were eligible to vote), and the "additional crew available to work" (the less frequent part-timers who the parties had stipulated were not eligible to vote). (JX 19.)[4]

Emami understood that he was required to give the Shaw Crew "full participation in the on-call list." (JX 24, p. 4.) Emami had no specific instructions other than he should make a special effort to use the members of the Shaw Crew listed as "most active." He understood he "should be fair" and allow the Shaw Crew "to be equally involved." (*Id.*) To implement Mickelson's instructions, Emami "generally work[ed] toward hiring the current crew and the Chris Shaw crew in equal shares." (*Id.*) He began by making telephone calls or sending text messages offering jobs to fill the crew. The number of offers he needed to make varied depending upon the size of the crew, availability, and response time. (*Id.*, p. 8.) It was easier to track and allocate the slots evenly for both crews for smaller shows. For larger shows Emami would fill slots according to who accepted the offer first because he needed to be sure the show was fully staffed. (*Id.*, p. 9.)

Emami kept a log identifying each show at the Riviera Theatre, the name of each person he contacted with an offer to work that show, how he contacted the individual (text or phone call), the date and time of the contact, whether the individual responded, and the individual's response.

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[4] Forty-four stagehands were included in the Settlement Agreement. (JX 5, R.00209-210.) The "most active" included the 19 regular part-timers on the Shaw Crew who had worked 18 or more shows during the Prior One-Year Period. (*See* note 2, *supra*, and Appendix, Chart 1.) The remaining 25 "additional" crew" were not regular part-timers because they had worked fewer than 18 shows during the Prior One-Year Period. *Id.* Many on the list of "additional" crew had hardly worked, if at all. Fourteen of them had worked 5 shows or fewer during the Prior One-Year Period. (*See* Appendix, Chart 1 (*e.g.*, Peter Falk, 0 shows; Mike Howe, 1 show; Cassandra Koziol, 1 show; Danny Alvarez, 2 shows; Quintin Muntaner, 2 shows; Joe Lyons, 2 shows; Tim Taylor, 3 shows; Tom Roszel, 3 shows; Eric Sanders, 3 shows; Lester Berry, 4 shows; James Bartolini, 4 shows; Joe Kelly, 4 shows; Mike Alvarez, 5 shows; Lou Svitek IV, 5 shows).) Three names, Brent Benson, Bertil Peterson, and Tom Roszel, were included in the list of "most active" by mistake. During the Prior One-Year Period, Benson had worked 15 shows, Peterson had worked 6 shows, and Roszel had worked 3 shows. (*Id.*) Benson and Peterson should have been listed with the "additional crew." Roszel appeared on both lists and should have been listed only with the "additional crew." (JX 19, p. 2.)

(Stip. ¶ 33; JX 27.) Emami's log covers all shows from April 7, 2016 (the first show after the Regional Director approved the settlement) through December 30, 2016.[5] Emami's log highlights in yellow the "most active" individuals on the Shaw Crew who had worked at least 18 shows during the Prior One-Year Period (Stip. ¶ 34) and highlights in green the "additional" stagehands on the Shaw Crew who had worked fewer than 18 shows during the Prior One-Year Period (Stip. ¶ 35). The individuals on Emami's log with no highlights are employees who had been working for Emami at the Riviera before the Settlement, *i.e.*, the New Crew. (Stip. ¶ 36.)

J. Emami Offers More Work Opportunities to the Shaw Crew Than to the New Crew

The Settlement Agreement required the Employer to "offer [the individuals listed] work in a non-discriminatory manner." (JX 5, R00212.) The Stipulated Record shows that the Employer made *more* offers to the Shaw Crew (the individuals listed in the Settlement Agreement) than to the New Crew.

For the show on April 7, 2016, Emami made offers to six members of the Shaw Crew and seven members of the New Crew, but the members of the Shaw Crew declined to work because they were unaware that the matter had been settled. (JX 24, pp. 3, 5-6.) For the next show on April 9, Emami contacted 19 individuals to fill 10 slots. The first two people he called were core members of Shaw's Crew, Archie Yumping and Gregor Kramer; they both got back to him and accepted the offers. He made a total of 13 offers to the Shaw Crew and only 6 to the New Crew. He ultimately filled the crew with 5 from the Shaw Crew and 5 from the New Crew based upon who accepted his offers. (JX 27.)

There were 35 shows from April 9 to December 30, 2016. To hire the stagehands for these shows, Emami's call logs establish that he made more calls and text messages to the Shaw Crew

[5] There were no shows from June 11, 2016 to September 12, 2016 because the Riviera has no air conditioning and is closed during the summer. (JX 27.)

offering work than he did to the New Crew. (JX 27.) The call logs show that members of the Shaw Crew either were not available or did not accept offers more often than members of the New Crew. *Id.* Part of the reason for this is that some members of the Shaw Crew could not or would not work shows at the Riviera Theatre. Stip. ¶ 46. Even though he could have filled the slots with far less time and effort by calling only the New Crew, Emami made more calls and offers to members of the Shaw Crew in an effort to be even-handed in filling each show crew. Altogether, Emami made more offers of work to members of the Shaw Crew for 21 shows, made more offers to members of the New Crew for 11 shows, and made the same number of offers to both crews for one show. JX 27. In sum, 54% of the offers to work were made to members of the Shaw Crew and 46% to the New Crew. *Id.*; *see* Appendix, Chart 3 for a summary.[6]

To make an apples-to-apples comparison, there were 19 members of the Shaw Crew who the parties agreed were "regular part-time" stagehands because they had worked 18 or more shows during the Prior One-Year Period. *See* Appendix, Chart 1, and n. 1, *supra.* These stagehands were identified as the "most active" Shaw stagehands along with three other names for a total of 22. JX 19, p. 2; *see* note 3, *supra.* Using all 22 of the "most active" Shaw stagehands, and 25 as the low end size of the New Crew (which was 25-30), the combined regular crews (Shaw Crew plus New Crew) included a total of 47 (22+25=47) individuals. The regular Shaw Crew made up 47% of the combined regular crew (22÷47=47%), so if members of the combined regular crew had been offered jobs randomly, the regular Shaw Crew would have been expected to receive 47% of the offers, while the members of the New Crew would have expected to receive 53% of the offers

[6] Chart 3 shows the totals and percentages. The offer totals were calculated from JX 27, Emami's offer log for the first show after the Shaw Crew was restored to the on call list (April 7, 2016) through the last show of 2016 ((December 30, 2016). The number of offers to the Shaw Crew is based upon a count of the highlighted names in JX 27, while the number of offers to the New Crew is based upon a count of the names not highlighted in JX 27.

(25÷47=53%). Yet as noted above, Shaw's Crew received 54% of the offers—*more than the percentage expected from random selection.*

K. Emami Offers Shaw's Four Main Stagehands a Greater Number of Work Opportunities

Emami's log (JX 27) also establishes that Emami offered work to Shaw's favorite stagehands, Gregor Kramer, Paul Repar, Justin Huffman, and Archie Yumping (JX 25, p. 2) more often than would have been expected by random selection. They were offered work by Emami 23, 17, 18, and 10 times respectively.[7] There were 603 offers to work extended to the regular members of the Shaw Crew and New Crew combined (688 total offers if Shaw's "additional" stagehands are counted). JX 27 and Appendix, Chart 3.[8] If Emami had selected from the "regular" stagehands randomly, a stagehand would have been expected to receive 13 offers to work. The fact that Shaw's favorite stagehands were contacted to work more often further negates the General Counsel's allegation that Jam discriminated against the Shaw Crew in making offers to work.

Huffman was an outspoken Union supporter. (Stip. ¶ 43.) Emami contacted Huffman to work the first few shows after the settlement. For the first show on April 9, 2016, Emami's log notes state that Huffman "questioned many practices, procedures." (JX 27, p.1.) Huffman told Emami he understood (incorrectly) that *all* crew spots were supposed to be designated for the Shaw Crew; Emami responded (correctly) that both crews were allowed to work and he would try to get a fair split between the two groups. (JX 24, pp. 9-10.) Emami's log notes for the April 16 show

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[7] Yumping stopped responding to Emami's texts and calls after the April 9, 2016 show, so Emami stopped contacting him after initially calling him frequently. (Stip. ¶ 46; JX 27.)

[8] The timesheets show that sometimes, but infrequently, Emami also contacted members of Shaw's "additional" stagehands who were not regular part-timers. (JX 27, ("additional" stagehands highlighted in green.) 85 offers were made to the "additional" stagehands. Thus, as depicted in Chart 3, there were a total of 688 offers (603 to regular stagehands and 85 to additional stagehands).

state that Huffman "was difficult with [the New] crew." JX 27, p.2. Despite not working well with the New Crew, Emami still offered Huffman work 18 times—more than would be expected by random selection.

L. Emami's Timesheets Show He Assigned Work Fairly

The stagehand time sheets for the period April 9 to December 30, 2016,[9] show that the Shaw Crew filled 151 of 327 slots or 46% of the positions, and the New Crew filled 175 slots or 54% of the call, excluding John Booher. (Stip. ¶ 37; JX 28.)[10] The Shaw Crew filled more slots for 5 shows, the New Crew filled more slots for 12 shows, and the Shaw Crew and New Crew filled an equal number of slots for 18 shows. Of the "all day" slots, excluding Booher, the Shaw Crew filled 48% or 69 of 144 "all day" slots, and the New Crew filled 52% or 75 of 144 slots.[11] Appendix, Chart 3. The filling of the all-day slots was affected by time restrictions expressed by individual stagehands. On numerous occasions, members of Shaw's Crew told Emami they were not available all day, but could work load-in/load-out, or just load-in or just load-out. JX 27.[12]

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[9] Again, yellow highlights indicate employees on the regular Shaw Crew who worked, green highlights indicate employees on the additional Shaw Crew who worked, and no highlight indicates individuals from the New Crew who worked.

[10] Booher worked every show as Emami's stage manager/lead stagehand. (JX 24, pp. 7-8; *see* JX 28, identifying Booher as "stage manager.") As stage manager and lead stagehand, Booher also initially contacted stagehands from the list Emami prepared, though Emami assumed these duties himself before the settlement. (JX 24, p. 3.) Emami relied upon Booher because Emami needed to dedicate himself to the technical aspects of the show and did not have a crew manager. (JX 24, p. 3.) In contrast, before September 16, 2015, the Riviera had both a production manager (Kevin Lynch) and a crew manager (Chris Shaw). Shaw's timesheets include himself as crew chief. (JX 26.) Emami's timesheets include Booher as stage manager. (JX 28.)

[11] For the show on May 28, 2016, four members of the New Crew were assigned the all-day slots. Emami was not at the Riviera Theatre that day. Jason Plahutnik worked in his place and made the assignments. (JX 24, p. 8.)

[12] Joint Exhibit 27, the Call Log, records that individuals responded to job offers either by confirming their availability generally or by stating they were available only for part of the day (load-in/load-out, load-in, or load-out). For example, for the Courtney Barnett show on April 28, 2016, Paul Wright and Tom Roszel, regular members of Shaw's Crew, responded to job offers by

The fact that Shaw's Crew refused work offers more often than the New Crew accounts for the difference between the percentage of offers made to Shaw's Crew and the percentage of slots filled by that crew. The Settlement Agreement required Jam to *offer* work without discrimination, and that is what Emami did. But he could not make Shaw's Crew accept those offers. The 46% of slots filled by Shaw's Crew is exactly what was expected by random selection from Shaw's regular crew, and the 48% of all day slots exceeded what was expected by random selection.

It is also significant that shows staffed by Emami required fewer stagehands than shows staffed by Shaw. As noted, the median crew size hired by Emami is 9,[13] while the median crew size hired by Shaw was 14.[14] This means that post-settlement, there were fewer slots to fill for each show.

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stating they were not available all day, and were available for load-out only. In response to job offers, regular members of the Shaw Crew stated they were not available for all-day work on numerous other shows including Father John Misty, A&O Ball, Amon Amarth, At the Drive-In, The Kills, Mudcrutch, Sturgill Simpson, Macklemore, RuPaul's Drag Race, Volbeat, Local Nations, Glass Animals, Opeth, Ingrid Michaelson, Rae Sremmurd, Elle King, The Naked and Famous, Zemfira, and Umphrey's McGee.

[13] The median size of Emami's crew is calculated based upon the timesheets he submitted from April 9, 2016 to December 30, 2016. (JX 28.) A median is used instead of a mean because a few shows had a very high number of stagehands due to the size and complexity of the show. *See e.g.,* Mud Crutch on May 28, 2016 and Macklemore & Ryan Lewis on June 9, 2016. Booher is included in calculating the median.

[14] The median size of Shaw's crew is calculated based upon the timesheets he submitted from September 22, 2014 to September 21, 2015. (JX 26.) To calculate the median, the employees identified as a runner, hospitality, production (Kevin Lynch) are not counted because they are not stagehand positions. Shaw or whoever was designated crew chief is included in calculating the median just like Booher is included in calculating Emami's median crew size (although time spent calling and filling slots is also excluded). Shaw's timesheets also show that for some reason Huffman often logged extremely long days, beginning early in the morning. (Jt. Ex. 26.)

M. The Charge in This Case Alleges Jam Breached the Settlement Agreement; the Charge Does Not Allege There Was No Agreement

On June 7, the Union filed the Charge in this case 13-CA-177838, alleging that Jam failed to offer the alleged discriminatees full participation in the on-call list because of their protected, concerted or Union activity; in retaliation for being discriminatees in the complaint and settlement agreement; and in violation of the terms of the settlement agreement. (JX 1(a).) Specifically, the Charge stated:

> [T]he above-named employer has been failing and refusing to offer the employees named as discriminatees in the complaint and settlement agreement in that case full participation in the on-call list because of their protected, concerted, or Union activity; in retaliation for their being named discriminatees in the complaint and settlement agreement; and in violation of the terms of the settlement agreement.

(JX 1(a).) There is no allegation that there was no meeting of the minds and hence no agreement. Nor is there any allegation that Jam violated the Settlement Agreement by not giving the Shaw Crew seniority or by not discharging the New Crew.

N. The Region Dismisses the Charge for Lack of Evidence of Violation of the Express Terms of the Settlement Agreement

On July 13, the Regional Director dismissed the Charge, finding, *inter alia*, the evidence insufficient to show that Jam is in violation of the "*express terms* of the settlement agreement" (JX 29 (emphasis added)); there is no mention of any implied terms. The Regional Director's dismissal letter states:

> From the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, as required by the settlement agreement that was reached in that case, because of their engagement in protected concerted or Union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.

(Stip. ¶ 39; JX 29.) The Union appealed.

O. The Region Reconsiders and Finds a Violation Based Upon Unspecified New Evidence. The Region Issues Complaint that Seeks Relief that Was Specifically Not Part of the Settlement Agreement

Several months later, on October 19, the Regional Director, after considering the Union's appeal as a request for reconsideration and unspecified "newly submitted evidence," reversed his decision and revoked the dismissal of the charge. (JX 30.)

The Region issued complaint on October 28. (JX 1(b).) The Complaint alleges that Jam had "failed to offer and assign work on a non-discriminatory basis" to the individuals named in the Settlement Agreement. (JX 1(b), p.3, ¶¶ VII(a) & VIII.) The complaint sought an order requiring Jam "to assign work to [the Shaw Crew] in the same order and frequency as their work assignments were made prior to September 21, 2015 without any loss in their seniority and benefits" and to pay them back wages. (JX 1(b), Remedy section, pp. 3-4.)

On October 31, the Regional Director sent the Employer a letter stating that the conduct alleged in the complaint "constitutes a default of the terms of the Settlement Agreement that was reached in Case 13-CA-160319." (JX 32, at R00229.)

P. The ALJ's Decision

The parties agreed this case would be tried on a Stipulated Record. The Region, the Union, and Jam all submitted briefs to the ALJ. While each party argued whether Jam had complied with the terms of the Settlement Agreement, no one argued that there had not been a meeting of the minds. But, the ALJ found *sua sponte* that there was no meeting of the minds and hence no agreement. (ALJ Dec. p.7.) Despite the Stipulated Record confirming that the parties knowingly and deliberately did not require that any seniority or privileges be given to the Shaw Crew, the ALJ found, as it relates to "seniority and any other rights and/or privileges" that the agreement is silent and thus susceptible to more than one interpretation. (ALJ Dec. p. 7:20-22.) But, the rejection of a proposed term is the opposite of silence, and there can only be one interpretation when, as

here, one party explicitly rejects a proposed term and the other party agrees to drop the proposed term and proceed with the settlement. The ALJ is not free to reject the Stipulated Record showing that Jam repeatedly rejected the Region's seniority demand and that the Region dropped the demand and proceeded with the settlement.

The ALJ also found that the parties "reasonably disagree" as to whether "immediate and full participation in the on-call list" requires a return to the on-call list previously used for the Shaw Crew or inclusion in an on-call list with the New Crew. (ALJ Dec. p. 7:18-20.) This is just another way of saying that there is an "ambiguity" about whether the Settlement Agreement required Jam to give the Shaw Crew seniority over the New Crew. But, there can be no ambiguity when the Stipulated Record shows that Jam never wavered from its position that it would not discharge the New Crew or give preferential treatment to the Shaw Crew (Stip. ¶ 17.) The term in question – seniority – was explicitly and repeatedly rejected by Jam, and the Region dropped the seniority demand in order to settle. The ALJ ordered that the underlying charge of wrongful termination in the underlying case be reinstated and that the charge in that case and the charge of breach of settlement in the instant case be tried. (ALJ Dec.,*p.*7:45-8:1.) This is not what either party intended or agreed. Jam and the Region settled the case to avoid the cost and burden of litigation. What the ALJ has done was to monumentally increase the cost and burden to Jam (and the Region).

The ALJ based his determination on the April 4, 2016, email from the Region to the Union (ALJ Dec. p. 5:11-15) finding this to be "evidence that the General Counsel, in responding to the Union's objection, expressed his opinion that the final version of the settlement agreement preserved the Shaw Crew's seniority rights notwithstanding the omission of specific language to that effect." (ALJ Dec. p. 7:32-34.) This is a plain error. First, the General Counsel's email to the Union was not shared with Jam either before or after the Settlement Agreement was entered – and there is nothing in the Stipulated Record that the Region ever communicated to Jam that the Region

was planning to imply a seniority requirement even though Jam had explicitly and repeatedly rejected that very term. Indeed, the parties had thoroughly hashed that issue out during the negotiations and the Region *dropped* its demand that the Shaw Crew be given seniority over the New Crew. Second, the Region obviously did not rely on this after-the-fact "interpretation" when it entered into the Settlement Agreement because the Region knowingly and deliberately dropped its seniority demand in the face of Jam's repeated and explicit refusals—and proceeded with the settlement without the requirement that the Shaw Crew be reinstated with seniority. A party cannot claim to rely on an implicit term when the other party explicitly rejected that term. Third, the Union also did not rely on the General Counsel's after-the-fact "interpretation" because the absence of specific seniority language was one of the reasons the Union refused to sign the agreement. The ALJ's conclusion that the parties did not have a meeting of the minds on the issue of seniority is contrary to all of the evidence in the Stipulated Record. The ALJ was not free to ignore the plain terms of the Settlement Agreement and the Stipulated Record showing that the parties knowingly and deliberately did not include any seniority requirement in the Settlement Agreement. [15]

IV. ARGUMENT

The holding that there was no meeting of the minds should be reversed because there was no such allegation in the charge or the complaint, which violates Jam's due process rights, and in any event, the ALJ's finding violates fundamental principles of contract law and is not supported by the Stipulated Record, key portions of which he ignored. The stipulated evidence shows that

[15] The ALJ found that the provision that Jam provide the Shaw Crew with "immediate and full participation in the on-call list" is somehow rendered ambiguous because Jam agreed to pay back-pay while omitting any reference to the New Crew. (*ALJ Dec. p.* 7:36-40.) This is a *non sequitur*. An agreement to settle is a negotiated compromise. Paying a relatively modest amount of back-pay to the reinstated stage hands is not probative of anything in this case. Worse, the ALJ totally ignores the stipulated facts that Jam insisted, and all parties understood, it would continue to employ the New Crew, and that this was the reason the Union objected to the Settlement Agreement.

the parties knowingly and deliberately did not include a seniority requirement in the Settlement Agreement and that Jam complied with its obligations under the Settlement Agreement.

A. The ALJ Violated Jam's Due Process Rights by Deciding the Case on a Basis That Was Not Alleged in the Complaint and No Party Had Argued

A complaint filed by the General Counsel must include "[a] clear and concise description of the acts which are claimed to constitute unfair labor practices." 29 C.F.R. § 102.15(b). The Board may not find and remedy a violation of the Act not specified in the complaint unless "the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003) (quoting *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enf'd* 920 F.2d 130 (2d Cir. 1990)). To do otherwise "would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it." *Lamar Cent. Outdoor*, 343 NLRB 261, 265 (2004). The Board has reversed an ALJ's finding and dismissed the complaint in an 8(a)(5) case because "the Respondent was denied an opportunity fully to litigate an issue the judge raised *sua sponte* in his decision." *Waldon, Inc.*, 282 NLRB 583 (1986).

The General Counsel charged Jam with violating the Settlement Agreement. This continued to be the General Counsel's theory throughout the trial on Stipulated Record before the ALJ. No one argued that there had not been a meeting of the minds between the Region and Jam (the Union refused to sign the agreement). Nonetheless, the ALJ recommended that Jam be denied the benefit of the agreement it made, not because it breached the agreement, but because he found there was no agreement, despite the extensive Stipulated Record showing that the Region knew exactly what it was doing when it dropped its demand that the Shaw Crew be reinstated with seniority and proceeded with the settlement.

In his consideration of the case, the ALJ *sua sponte* materially modified the complaint against Jam. He held there was no meeting of the minds and ordered that Case No. 13-CA-160319,

which all parties agreed had been settled, be tried, along with this case. It is clear that Jam never had an opportunity to defend itself against this claim because it was not in the complaint issued by the Region and it was not an issue in the case that was tried before the ALJ. Although Jam argued that it complied with the Settlement Agreement (and the General Counsel and the Union argued the opposite), it did so without knowledge that the ALJ would go off on his own to find there was no settlement agreement (despite the fact that it already has been implemented) and that the parties would have to litigate the underlying complaint in Case No. 13-CA-160319 that all parties agree has been settled. Because the ALJ's recommendation is beyond the scope of the complaint and the issues in dispute, his finding that there was no Settlement Agreement should be set aside.

B. The ALJ Violated Established Principles of Contract Law and Ignored Relevant Evidence in Finding There Was No Meeting of the Minds and Hence No Agreement

Courts, the Board, and arbitrators routinely decide contract interpretation cases. As Judge Posner wrote in *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications*, 20 F. 3d 750 (7th Cir. 1994), "the premise – that a 'meeting of the minds' is required for a binding contract -- obviously is strained." Judge Posner observed that "[m]ost contract disputes...are treated as disputes over contractual meaning, not as ground for rescinding the contract and thus putting the parties back where they were before they signed it." *Id.* at 751. The rare case where a court orders rescission on the ground there was no meeting of the minds usually arises where, due to a drafting mistake or accident, "it is impossible to say that they ever agreed – that they even have a contract that a court or arbitrator [or the Board] might interpret." *Id.* at 752. Put differently, if due to a mutual misunderstanding, *i.e.*, neither party knows or has reason to know the meaning attached by the other, there is no sensible basis for choosing between conflicting understandings of the contractual language and neither side can be assigned the greater blame for the misunderstanding then a court will not enforce either side's version. *Id.* at 753, 756; *see also*

Hempstead Park Nursing Home, 341 NLRB 321, 322-323 (2004). This is not a case where there was no meeting of the minds or where the Region did not understand that Jam would not be giving seniority to the Shaw Crew. The Stipulated Record shows that the Region fully understood that Jam would not terminate the New Crew and would not give the Shaw Crew seniority or other preferences. The Region understood this because Jam repeatedly and explicitly rejected these very terms during the settlement negotiations and because the Region knowingly and deliberately dropped these demands when it agreed to settle. Neither side claims there was a drafting mistake or accident and neither side could credibly make a claim of mutual misunderstanding given the parties' bargaining history, exchange of proposals, and the final terms of their agreement.[16]

1. The Region's Idiosyncratic "Opinion," Not Conveyed to Jam, that the Final Agreement Includes Seniority and Other Rights for the Shaw Crew, Is Irrelevant and Is Not Evidence of a Lack of Meeting of the Minds. The Stipulated Record and All Communications Between the Parties Confirm the Region's Agreement that the Shaw Crew Would Not Have Any Seniority or Other Rights. The Region is Bound by Its Terms.

The ALJ's major error is that he violated the principle that a signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one and that private intent counts only if it is conveyed to the other party and shared. The ALJ violated this principle when he gave weight to the General Counsel's idiosyncratic interpretation of the settlement agreement that was not conveyed to Jam and was not shared. As the Seventh Circuit has held:

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[16] The principal case cited by the ALJ, *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006), is the odd case where the meaning each side ascribed to their agreement failed to give effect to language in the agreement and rendered it meaningless. Here, the meaning ascribed by Jam—that the Settlement Agreement does not require the Shaw Crew to be given any seniority or preferences—is consistent with the express terms of the agreement, which contains no such requirement, and it is confirmed by the Stipulated Record showing that Jam repeatedly and explicitly refused any such requirement and that the Region ultimately dropped its demand and agreed that the Settlement Agreement would not include any requirement that the Shaw Crew be given seniority or other privileges. The *Doubletree* holding has no application to a Settlement Agreement that plainly contains no seniority requirement and where the parties have stipulated that they deliberately excluded any seniority requirement.

> A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared. *E.g.*, *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814–15 (7th Cir.1987); E. Allan Farnsworth, *Contracts* 113–16 (1982). You can't escape contractual obligation by signing with your fingers crossed behind your back, even if that clearly shows your intent *not* to be bound.

Robbins v. Lynch, 836 F.2d 330, 332 (7th Cir. 1988). "Private intent is irrelevant." *Id.* Or as the Board has stated, "[w]hether a meeting of the minds was reached is determined not by the parties' subjective intentions, but by their intent as objectively manifested in what they said *to each other*." *MK-Ferguson Co. and United Assoc. of Journeymen*, 296 NLRB 776, n. 2 (1988) (emphasis added). The Seventh Circuit applied this principle to whether an employer and Union had a meeting of the minds to form a collective bargaining agreement:

> So it is here. Lynch may have had a private intent, but the signs visible to the Union all pointed to Lynch's acceptance of the collective bargaining agreement. Lynch is bound by its terms.

Robbins, supra, 836 F. 2d at 332*; see also TKO Equipment Co. v. C&G Coal Co.,* 863 F. 2d 541, 545 (7th Cir. 1988) (contracting parties may use words as they please so long as they share their meaning).

And so it is here, too. The Region is bound by its terms. Whether or not the General Counsel had a private belief that the final settlement agreement implicitly included seniority and other rights and privileges for the Shaw Crew (even though the parties had explicitly excluded such terms), the Region never communicated that understanding to Jam. The Stipulated Record –and all signs visible to Jam—confirmed the Region's agreement that the Shaw Crew would not have any seniority or other rights.

On at least six occasions, the General Counsel proposed to include seniority and other rights and privileges in the settlement agreement, and each time Jam rejected these provisions. Jam's March 15, 2016 offer (JX 14), which the General Counsel accepted without change or reservation and which became the final settlement agreement, deleted the seniority and other rights

and privileges language from the General Counsel's proposals and provided simply that Jam will offer "immediate and full participation in the on-call list ... without discrimination because of their Union membership or support for the Union." (JX 14, R.154, 1st We Will.)

The General Counsel did not contradict Jam or state "It's our position that notwithstanding the fact that the Region dropped the seniority requirement from its settlement demand that Jam is nonetheless required to use seniority in assigning work." Instead, on March 16 the General Counsel simply sent Jam an email accepting Jam's final offer and expressing full agreement with Jam's changes to the agreement: "Enclosed is the newly revised settlement agreement and notice for the above-captioned case. The Region made the revisions as proposed." (JX 15, R.163; *see* also JX 16, the March 17 email from the General Counsel stating "Yes the Region agreed with all your changes as proposed.") The Region accepted Jam's settlement offer, knowing that Jam had stated it would not displace the New Crew or give the Shaw Crew seniority or preferential rights. (Stip. ¶ 17.) The Region did not convey its idiosyncratic after-the-fact position to Jam. The ALJ also ignored the fact that the Union—the only one to whom the Region conveyed its idiosyncratic "opinion" of the settlement agreement—did not believe that the Region's alleged "opinion" was a reasonable reading of the plain language in the agreement and refused to sign the agreement because it did not provide for seniority and other rights.

The ALJ's role "was to interpret the agreement, not additions to it by one party without the consent of the other—such additions could not amend the agreement." *Bankers Life & Cas. Ins. Co. v. CBRE, Inc.,* 830 F. 3d 729 (7th Cir. July 29, 2016) (Posner, J.). "It was like Mr. A agreeing in writing to pay Mr. B $10, and B responding (with hand held out and palm open): 'I have changed $10 to $20.'" *Id.* at 732. Allowing the General Counsel's private intent, not communicated to or shared by Jam, to change the meaning of the agreement so as to lead to the conclusion that there was no meeting of the minds and hence no agreement, would give any party to an agreement *carte*

blanche to walk away from its agreement merely by asserting that it understood that a provision that was deliberately deleted from the final version of the contract as the condition of getting to a contract nevertheless was still "implied" in the contract. That would make contracts vacuous and illusory; it would place one party at the other's mercy.

So, contrary to the ALJ's finding, there is no evidence that even arguably counterbalances the Stipulated Record showing that that the final agreement does not – and was not intended to – include seniority or any other rights or privileges. The General Counsel's idiosyncratic position, not communicated to Jam or shared, is irrelevant.

The ALJ's finding also violates the principle that meaning and effect must be given to every part of the contract including all its terms and provisions, so no part is rendered meaningless or surplusage unless absolutely necessary. *Ineos Polymers Inc. v. BASF Catalysts*, 553 F.3d 491, 500 (7th Cir. 2009). The ALJ's finding renders the multiple "seniority" and "other rights or privileges" provisions in the draft agreements (JX 6-9) that were deleted from the final agreement mere surplusage, as if their presence in the Region's numerous proposals was meaningless.

When the General Counsel meant to propose that the Shaw Crew be given seniority over the New Crew he knew exactly how to say it using that very word. (*See* the GC's proposed agreements of December 4, 2015 (JX 7 ("seniority" used twice)); January 14, 2016 (JX 8 (same)); February 1, 2016 (JX 9 ("seniority" used three times)); and March 11, 2016 (JX 6 ("seniority" used once)); *see also* Second Amended Complaint, filed March 4, 2016 (JX 4 (using "seniority").) Further, when the General Counsel meant to confer the Shaw Crew "any other rights and/or privileges previously enjoyed" he knew how to use that phrase too. (*See* the GC's draft agreements of December 4, 2015 (JX 7 ("or any other rights or privileges" used once)); January 14, 2016 (JX 8(same)); February 1, 2016 (JX 9 (same)); and March 11, 2016 (JX 6 (same)). And when the General Counsel sought to have the Shaw Crew to be assigned work in the same order and

frequency as before their discharge, he knows how to say that in specific terms. (*See* Complaint in this case, JX 1(b), Remedy, pp. 3-4 (seeking an order "to immediately restore the [Shaw Crew] to the out of work roster … and to assign work to them *in the same order and frequency as their work assignments were made prior to September 21, 2015 without any loss in their seniority* ....") (emphasis added).) It is clear from the final agreement, which deliberately excludes any requirement that the Shaw Crew be given "seniority," or "any other rights and/or privileges previously enjoyed," or of assigning work "in the same order and frequency" as before the discharges, that when they entered into the Settlement Agreement the parties did not intend to give the Shaw Crew any seniority and other preferences over the New Crew.

Jam was entitled to rely on the plain terms in the Settlement Agreement that it signed. It is clear from the final language of the agreement, the bargaining history and proposals, and the Union's refusal to sign the agreement because it does not include seniority rights, that the Settlement Agreement does not include seniority or other preferences.

2. The ALJ Also Erred When He Found that Agreeing to One Element of Make Whole Relief Created an Ambiguity as to Whether Jam Agreed to Complete Make Whole Relief.

"[T]he fact that parties to a contract disagree about its meaning does not show that it is ambiguous, for if it did, then putting contracts into writing would provide parties with little or no protection." *Green v. UPS Health &Welfare Package for Retired Employees*, 595 F.3d 734, 738 (7th Cir. 2010). "[W]e only apply rules of construction when a genuine ambiguity exists in the language, not merely when the parties disagree as to how the language should be interpreted." *Rexam Beverage Can Co. v. Bolger*, 620 F.3d 718, 726 (7th Cir. 2010). The ALJ again committed error when he found ambiguities where none exist if he had considered the parties bargaining history and the final terms of the agreement.

The ALJ's finding that Jam's agreement to one element of make whole relief—full back pay—creates an ambiguity as to whether it agreed to provide complete make whole relief on every element, including the discharge of the New Crew (ALJ Dec. p. 7:36-40), is a non-sequitur. A settlement is a compromise—a *quid pro quo*:

> Settlement agreements are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the [agreement] itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant [agreement] embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a [settlement agreement] must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the [agreement], waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681–82 (1971).

Each party negotiated the best deal it could in light of the risks of litigation and the desire save time and expense.[17] Jam agreed to full back pay after determining that the amount sought by the Region was less than the cost of preparing for and trying the case and also avoided the time and inevitable risk of trial. But Jam explicitly and repeatedly refused to terminate the New Crew and refused to provide the Shaw Crew with seniority over the New Crew or any other privileges. Had the parties intended that Jam terminate the New Crew or provide the Shaw Crew with

[17] In addition to parties' usual desire to eliminate the cost, burden and risk of litigation, the Region had received directions from the Office of the General Counsel to make additional efforts to settle ULP cases. (*See* Office of the General Counsel, Division of Operations-Management memorandum to all Regional Directors et al. re: *Casehandling Cost Savings Instructions for Remainder of Fiscal Year 2016*, Memorandum OM-16-09 (March 9, 2016) directing all Regional Offices to *redouble efforts to settle ULP cases* and to do so *as early as possible* to achieve the greatest savings in light of the agency's significant budget deficit. (Appendix 4).)

seniority, they would have included that in the Settlement Agreement (as the Region had repeatedly proposed). But that is not what happened. Moreover, paying back-pay *and* replacing the New Crew with the Shaw Crew was the ultimate relief sought by the Region in the underlying proceeding – such terms would not have been a compromise, it would have been a default judgment or complete capitulation, and there would have been no reason for the months-long extensive negotiation of the agreement (which plainly does not require that the New Crew be terminated or that the Shaw Crew be given seniority or any other privileges over the New Crew).

The ALJ's finding also ignores the negotiation history and the terms of the final Settlement Agreement. It ignores Jam's insistence early in the negotiations, from which it never wavered, that *Jam would not agree to discharge the New Crew* or to give the Shaw Crew any *seniority or preferential treatment* over the New Crew. (Stip. ¶ 17). The Settlement Agreement was not intended to provide "make whole" relief, it was intended to be a compromise.

The ALJ also failed to consider the material differences between the Region's initial proposal and the final Settlement Agreement. The Region's initial settlement proposal included "[1] immediate and full *reinstatement to* [the discriminatees'] *former jobs and* [2] *restore their names to the work assignment roster* [3] in accordance *with seniority* ... [4] *without prejudice to their seniority or any other rights and/or privileges previously enjoyed.*" (JX 7, R.53, 1st "We Will.") The final Settlement Agreement provides "[1] immediate and full *participation in the on-call list* ... [2] without discrimination because of their Union membership or support for the Union, and [3] offer them work in a non-discriminatory manner." (JX 5.) A court must give meaning to every provision and not render words mere surplusage. So the Region's initial proposal requiring "*immediate and full reinstatement to* [the discriminatees'] *former jobs,*" "in accordance *with seniority*" and "without prejudice to their *seniority*" must mean something more or different from

"immediate and full *participation in the on-call list* … without discrimination" – especially where, as here, the Stipulated Record shows that Jam explicitly rejected any seniority requirement.

The final agreement also deleted references to seniority and other rights and privileges and did not require Jam to recognize and bargain with the Union, and it included a non-admission clause. Thus, contrary to the ALJ's conclusion, the Settlement Agreement itself and the Stipulated Record shows that the Settlement Agreement was a compromise. The fact that as part of the compromise, Jam agreed to pay back pay does not even arguably show that the parties intended the Settlement Agreement to provide make whole relief. The ALJ apparently lost sight of the fact that Jam strenuously denied the basis for the underlying complaint and that *both* parties entered into a heavily-negotiated settlement agreement with the attendant trade-offs to avoid costs, burden and risks of litigation.

The ALJ's analysis also ignores the effect of the non-admission clause in the final agreement. Specifically, the Union objected to the non-admission clause because it meant that the New Crew would *not* be discharged in favor of the Shaw Crew. (JX 20.) The parties – and the Union – clearly understood that the Settlement Agreement did not require that the Shaw Crew be given any seniority or other privileges over the New Crew. The Union refused to sign the Settlement Agreement for that very reason.

The ALJ also failed to compare the prayer for relief in the Complaint in this case, with the final Settlement Agreement. In its Complaint, the Region sought as a "Remedy" that Jam be required to "restore the [Shaw Crew] to the out of work roster … and to assign work to them in the same order and frequency as their work assignments were made prior to September 21, 2015 without any loss in their seniority …." (JX 1(b), pp. 3-4.) Likewise the complaint in the prior case sought an order requiring Jam to "immediately *reinstate* all [alleged discriminatees] *to their former positions* without any loss in *seniority* and benefits and make [them] whole for any lost wages."

(JX 4, p. 4 (emphasis added).) The Shaw Crew's "former positions" is that they held *all* the stagehand jobs. However, in the final Settlement Agreement, the parties deliberately excluded the General Counsel's proposed term requiring "reinstatement to their former jobs" because Jam explicitly and repeatedly refused that term. This once again shows that the General Counsel initially sought a status quo remedy returning the Shaw Crew to their former positions with seniority rights, but after negotiations, agreed to less in the final Settlement Agreement.

The ALJ's decision violated all of these principles of construction. When these principles are applied to the stipulated evidence, there can be no question that there was a meeting of the minds and a valid and enforceable Settlement Agreement that plainly does not require that the Shaw Crew be given any seniority or other preferences over the New Crew. And as we now show, Jam complied with that agreement.

C. Jam Complied With the Agreement. The General Counsel Failed to Carry His Burden of Proving Jam Violated the Agreement

The Complaint alleges that Jam failed to offer and assign work to the Shaw Crew in a non-discriminatory manner. (JX 1(b), para. VII.) As an initial matter, the procedural history of **this** case shows that the current position taken by the General Counsel, *i.e.*, that Jam restore the *status quo* by requiring Emami to use the Shaw Crew first before he uses any member of the New Crew (and thereby effectively discharge the New Crew in the process) is a reversal of the Regional Director's original position that defies explanation. On July 13, 2016, the Regional Director dismissed the Charge, finding, *inter alia*, the evidence insufficient to show that Jam is in violation of the "*express terms* of the settlement agreement" (JX 29 (emphasis added)); there is no mention of any implied terms. The Regional Director's investigation dismissal letter states:

> From the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, as required by the settlement agreement that was reached in that case, because of their engagement in protected concerted or Union activity, or because they were named as

> discriminatees in the Complaint or Settlement Agreement. Further, the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.

During the investigation, Jam submitted the same evidence and made the same arguments it made to the ALJ and it makes now. Jam's position statement included the same log notes and time sheets in the parties' Stipulated Record. (*See* Appendix Attachment 5, pp. 3-6.) The log notes showed that Emami was contacting members of both the Shaw Crew and the New Crew to work shows, and the time sheets showed that both crews were, in fact, working shows. Jam pointed out (p. 5) the same trends in the log sheets and time sheets it pointed out to the ALJ and now to the Board: to fill the crew Emami typically contacted more members of the Shaw Crew to work shows compared to the New Crew, members of the Shaw Crew were more inclined than the New Crew to decline opportunities to work, and when they do work more members of the Shaw Crew are just as likely as the New Crew to work all day. The entirety of the position statement, including the log and time sheet records, made crystal clear that both crews were working similar amounts. There was no other way to interpret the call logs and time sheets. Jam made the same arguments it made to the ALJ and it makes now: the Settlement Agreement provides the Shaw Crew "full participation in the on-call list" for stagehand work at the Riviera Theatre without any rights or privileges other than the right not to be discriminated against because of their support for the Union, and does not provide the Shaw Crew either exclusive participation or preferential participation in the on-call list, or any special privileges.

Given this procedural history, it is inexplicable that the General Counsel now says that the parties' Settlement Agreement means that Jam was required to restore the status quo. If nothing else, this procedural history shows there was no misunderstanding or lack of awareness on the part of the Region regarding Jam's implementation of the language providing "full participation in the on-call list" for work assignments as required by the Settlement Agreement. The dismissal

of the Charge following the Region's investigation proves it. It appears the Region just changed its mind based upon the Union's appeal despite the fact that the Union was not a party to the Settlement Agreement. But the Region is not allowed to change its mind about the terms it agreed to in the Settlement Agreement, and the ALJ was not allowed to release the Region from a valid, enforceable, unambiguous, and fully implemented settlement agreement simply because the Region changed its mind.

The General Counsel bears the burden of proving a breach of the agreement just as he bears the burden of proving discriminatory conduct in a case under the Act. 29 U.S.C. §160(c). The General Counsel's position that the Shaw Crew needed to be put back to the same position they occupied before being discharged ignores the negotiation history, the back and forth proposals, and the terms of the final Settlement Agreement. It ignores Jam's insistence early in the negotiations, from which it never wavered, that *Jam would not agree to discharge the New Crew* or to give the Shaw Crew any *seniority or preferential treatment* over the New Crew. (Stip. ¶ 17.)

There is no evidence of discrimination. There is no evidence that Jam refused to offer work assignments to the Shaw Crew "because of their Union membership or support for the Union" (JX 5) or otherwise based on protected activity. There is no testimony or documentary evidence that reflects any discrimination against the Shaw Crew. To the contrary, the Mickelson Memo and the Emami Affidavit show just the opposite. (Stip. ¶¶ 19 and 26; JX 19 and 24.) Jam specifically instructed Emami, as follows:

> [U]nion support or membership, or lack of support or membership in the Union, may not play any role – NONE – in the hiring decisions you make. … And, you have to give fair consideration to [Shaw's] former crew …. this isn't just an April 2016 obligation. You must make sure that you continue to hire stagehands in a completely non-discriminatory manner.

(Stip. ¶¶ 19 and 26; JX 19 and 24.)

The evidence shows that Emami fully complied with these instructions (and the Settlement Agreement) and was completely even-handed in making work offers. (Stip. ¶¶ 25, 26, 33-37; JX. 24, 27 and 28.) It would have been natural—and non-discriminatory—for Emami, who knew, liked, and trusted the New Crew (JX 24, p. 4) but did not know the Shaw Crew nearly as well, to continue to fill jobs first from the New Crew instead of gambling with new people. This would not have constituted discrimination *because of* Union activity. The following hypothetical illustrates this. A Manager hires Individual B who he knows from experience possesses the key qualifications of skill, work ethic and ability to work well with others and who has been praised by key customers, instead of Individual C, whose qualifications he does not know well and who had engaged in Union activity. The test of discrimination in this hypothetical is whether, had C not engaged in Union activity but everything else remained the same, Manager would have made the same decision. In this hypothetical, Manager would not have hired C if C had never engaged in Union activity. Manager made the decision for non-discriminatory reasons.

Emami could have filled positions first from the New Crew because he knew the New Crew well and liked and trusted their work, as did the road crews and band managers, while it would have been a gamble to hire someone he did not know well and trust. But in fact Emami made *more* offers to the Shaw Crew than to the New Crew and made *more* offers to the Shaw Crew than would have been made had he made offers based on random selection from a single combined pool consisting of all the Shaw and New Crew members, as we show below. (Stip. ¶¶ 33-37; JX 27 and 28.)

1. The Shaw Crew Received More Offers to Work than the New Crew.

Jam was entitled to rely upon the settlement agreement it signed. Once the Settlement Agreement was approved by the Regional Director, Emami began to offer work equally to the Shaw Crew and the New Crew. As explained above, he made *more offers of work to the Shaw*

Crew than to the New Crew. Specifically, he made 54% of his offers to the Shaw Crew, while only 46% to the New Crew. (JX 27, 24 p. 5; *see also* Section III, *supra,* pp.. 19-21.) He also spent *more* time and effort offering work to the Shaw Crew because they did not accept offers of work as frequently as the New Crew. (Stip. ¶ 46; JX 27.) Emami spent this extra time in order to be even handed and fair to the Shaw Crew. He did this even though he had already developed a good crew in the New Crew and was very satisfied with their performance, as were the bands who performed at the Riviera, and it would have been quicker and easier for him to continue making offers first to the New Crew. (JX 24, p. 4; Stip. ¶ 19; JX 19.) Thus, as explained further below, Emami's effort to seek a 50/50 split in the crew between the New Crew and the Shaw Crew operated as an affirmative action plan for the Shaw Crew, who would otherwise have had fewer jobs for non-discriminatory reasons.

2. The Shaw Crew Received More Offers to Work Than Would Have Been Expected by Random Selection.

The Shaw Crew received *more offers to work* than would be expected by random selection and were *more likely* to be offered work than the New Crew. As explained above, the regular Shaw Crew made up 47% of the combined Shaw/New crew (22÷47=47%), so if members of the combined crew had been offered jobs randomly, the regular Shaw Crew would have been expected to receive 47% of the offers, while the members of the New Crew would have been expected to receive 53% of the offers (25÷47=53%). Yet the Shaw Crew received 54% of the offers—*more than would have been expected* from random selection. (*See* Section III, *supra,* pp. 19-21.) This, too, proves there was no discrimination.

3. The Shaw Crew Filled More of the More Desirable All-Day Jobs Than Would Have Been Expected by Random Selection and the Same Number of Total Slots as Expected on a Random Basis.

Even though Shaw's Crew often turned down opportunities for all-day work (JX 27), they still filled 48% of the all-day slots, which exceeded the 47% expected by random selection. (Stip.

¶ 37; JX 28; *see also* Section III, *supra,* pp. 22-23.) Likewise, because of Emami's extra efforts to make more offers to the Shaw Crew than the New Crew to ensure even-handed treatment, the Shaw Crew filled 46% of the total slots (*id.*), which is exactly what would have been expected by random selection, this despite the fact that several of the regular members of the Shaw Crew who were included in the 22 regular members of the Shaw Crew "cannot or will not work shows at the Riviera: Archie Yumping stopped returning Emami's texts and/or calls [offering work]; Gabriel Thompson relocated to another state; Brent Benson has a serious medical condition that prevents him from working; and Brad Sikora passed away." (Stip. ¶ 46.)

4. The Four Stagehands Who Had Worked the Most Under Shaw Received More Work Offers from Emami.

The offers made to Shaw's favorite stagehands also negates any claim of discrimination. Shaw had four main stagehands who worked the most shows when he was crew chief—Gregor Kramer, Paul Repar, Archie Yumping and Justin Huffman. (JX 25, p.2.) Except for Yumping, who refused to work shows at the Riviera and stopped responding to Emami's job offers (Stip. ¶ 46), Shaw's main stagehands received more offers than what would have been expected by random selection. JX 27; *see also* Section III, *supra,* pp. 21-22.)

Huffman is a particularly instructive example because he was the most open Union supporter: he distributed Union authorization cards, was the sole member of the Shaw Crew to appear at the Representation Case hearing, and was the Union's sole observer at each of the two sessions of the representation election. (Stip. ¶ 43.) Yet Emami offered him work 18 times, which was more than would have been expected by random selection, even after Huffman had not worked well with other crew members (JX 27, p.2), which was one of Emami's three criteria for selecting stagehands.

5. All the Stagehands from Both Crews Were Disappointed They Received Fewer Work Opportunities After the Settlement.

It was natural that the Shaw Crew was and is disappointed with the amount of work they received after the settlement. They were forced to compete not only with a larger pool of stagehands (the combined New Crew and Shaw Crew), but also for a smaller piece of a smaller crew (nine stagehands per show under Emami compared to 14 stagehands per show under Shaw). But the Settlement Agreement did not guarantee the Shaw Crew the same amount of work and did not provide them with any preferential treatment over the New Crew. The New Crew also was unhappy with the reduced opportunity to work when the two crews were combined, but they understood that the Employer had settled the case concerning the Shaw Crew and that, per the Settlement Agreement, both crews would participate in the on-call list. (Jt. Ex. 24, p. 4.)

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There is no evidence that the Employer breached the Settlement Agreement by failing to offer and assign work on a non-discriminatory basis. All of the stipulated evidence is to the contrary. The General Counsel and the Union cannot meet their burden to show discriminatory conduct, and the case should have been dismissed.

6. Jam Was Not Required to Offer Work by Seniority or to Discharge the New Crew.

The final settlement agreement does not contain any language conferring seniority rights or any other rights and/or privileges. When the Region wanted to include seniority or any other rights and/or privileges in proposals, it did so explicitly and repeatedly. During the settlement negotiations, the Region repeatedly proposed express seniority or any other rights and/or privileges provisions. (*See, e.g.,* JX 6, 7, 8, 9, 11 and 12.) Jam repeatedly stated it would not agree to any seniority or other rights and privileges and deleted all such language from its counterproposals. Jam also insisted it would not discharge the New Crew or grant the Shaw Crew any preferential

treatment. The final agreement was formed when the Region accepted Jam's final counteroffer that deleted all language conferring seniority and other rights and privileges and did not contain any provision calling for the reinstatement of the Shaw Crew to their former jobs or discharge of the New Crew.

The bargaining history shows the settlement agreement was a compromise that afforded the Shaw Crew some relief but not the full relief the General Counsel could have obtained if he chose to go to trial. The scope of the agreement "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour*, 402 U.S. 673, 681–83 (1971). "Because the defendant has, by the [settlement agreement], waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the [agreement] must be construed as it is written, and not as it might have been written had the [General Counsel] established his factual claims and legal theories in litigation." *Id.* at 682. Settlement agreements "should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975). *Compare Windward Roofing & Construction Co.,* 342 NLRB 774 (2004) (where there was a preferential rehire list). Under these basic principles, the agreement did not provide the Shaw Crew any seniority or other rights and privileges and did not require the discharge of the New Crew. Everyone understood the agreement did not confer the Shaw Crew any preferences over the New Crew. Everyone understood the agreement did not require displacement of the New Crew. The Union understood this and refused to become a party to the agreement for these very reasons. As addressed above, the General Counsel's idiosyncratic, after-the-fact "opinion"—not shared with Jam—that the agreement implicitly required seniority (even though the parties explicitly excluded seniority) cannot change

the agreement and is irrelevant. Moreover, it did not persuade the Union that the agreement conferred seniority and other rights and privileges, when the Settlement Agreement deliberately excluded any such requirements. The Union saw through the Region's supposed opinion and refused to become a party to the Settlement Agreement because it did not require that the Shaw Crew be given any seniority or privileges over the New Crew.

7. Jam Was Not Required to Offer the Shaw Crew the Same Amount of Work as Before the Discharge.

The bargaining history, exchange of proposals, and final settlement language show that the Shaw Crew is not entitled to the same amount of work as before the discharge. Otherwise, the New Crew would get no work and be effectively discharged. The Stipulated Required shows that Jam adamantly refused to discharge the New Crew, adamantly refused to provide the Shaw Crew any seniority or preferential treatment, adamantly refused reinstatement language for the Shaw crew, and adamantly refused to confer seniority or other rights and/or privileges language for the Shaw crew. The final Settlement Agreement also contains a non-admission clause, which the Union knew meant the New Crew would not be discharged, and the Union refused to sign the agreement because of it and the absence of seniority rights for the Shaw Crew.

The General Counsel and the Union may argue that Emami's effort to make up crews consisting of half New Crew members and half Shaw Crew members discriminatorily capped the Shaw Crew's opportunities. But even the ALJ acknowledged that the primary issue in this case is the meaning of the phrase in the settlement agreement "immediate and full participation in the on-call list." (ALJ Dec.. p. 1.) Emami's method can only be considered as a good faith effort to comply with the full participation requirement in the settlement agreement and to ensure equal treatment to the Shaw Crew. Keeping track of which stagehands were included in the Settlement Agreement – so that they would be offered work at least as often as the New Crew – facilitated compliance with the Settlement Agreement by serving as a reminder to treat the Shaw Crew fairly and aided

Emami in offering work to stagehands evenly. The results and offers made and slots filled prove that keeping track of offers and assignments to each of the two crews was not an act of discrimination.

Emami's attempted 50/50 split of job offers would be discriminatory only if there was evidence that by random selection the Shaw Crew would have received more offers, but that is not the case here. In fact, the evidence shows the Shaw Crew received more offers than would have been expected by random assignment. In order for the 50/50 goal to be discriminatory, the General Counsel would have to prove that but for the goal, the Shaw Crew would have had more jobs. To do this, the General Counsel would have to prove that the Shaw Crew members were more qualified than the New Crew members. But there is no evidence of their comparative qualifications and no evidence that the Shaw Crew Members were more qualified. To the contrary, the evidence is that Emami had already developed a good crew in the New Crew and was very satisfied with their performance, as were the bands who performed at the Riviera, and it would have been quicker and easier for him to continue making offers first to the New Crew.

The Shaw Crew received more job offers than would have been expected by chance. The General Counsel has failed to prove that the 50/50 goal used by Emami discriminated against the Shaw Crew.

V. CONCLUSION

For the reasons stated above, the Board should overrule the ALJ's rulings, findings, and conclusions, dismiss the charge and complaint, and hold that Jam complied with the settlement agreement.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAM PRODUCTIONS, LTD. and EVENT PRODUCTIONS, INC.

and

Case No. 13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION LOCAL NO. 2, IATSE

APPENDIX

Submitted by:

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July 10, 2017

APPENDIX 1

CHART 1: HIRE DATE AND NUMBER OF SHOWS WORKED FOR STAGEHANDS LISTED IN SETTLEMENT AGREEMENT

Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Kramer, Gregor	3/15/1998	60
Yumping, Archie	10/25/1998	36
Huffman, Justin	11/1/1998	51
Repar, Paul	6/20/1999	40
Phipps, Chris	6/11/2000	19
Bulawa, Scott	11/12/2000	29
Glazebrook, Chris	4/22/2001	33
Wright, Paul	4/7/2002 (hired before)	41
Kelly, Joe	6/30/2002	4
Garrity, Tom	1/5/2003	12
Fritz, Jerry	10/19/2003	30
Pospishil, Eric	11/2/2003	6
Ross, Adam	7/8/2005	23
Benson, Brent	6/16/2006	15
Lyons, Joe	9/27/2006	2
Mangnall, Bryan	10/14/2006	30
Svitek, Lou	7/6/2007	26
Pollak, Martin	10/3/2008	11
Sikora, Brad	5/16/2009	41
Gunn, Sean	10/30/2010	6
Carter, Todd	4/15/2011	20
Fritz, Zach	4/15/2011	10
Mulvey, Mike	4/15/2011	21
Peterson, Bertil	5/13/2011	6
Thomson, Gabe	5/13/2011	47
Koziol, Cassandra	7/7/2011	1

Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Bartolini, James	10/8/2011	4
Berry, Lester	10/22/2011	4
Dombrovskis, Alek	10/22/2011	8
Bilecki, Ed	11/4/2011	46
Curry, Nick	4/21/2012	9
Sanders, Eric D	6/26/2012	3
Svitek IV, Lou	6/29/2013	5
Chambers, Chris	9/9/2013	20
Leggett, Chris	9/28/2013	34
Bauminis, Karlis	11/3/2013	9
Howe, Mike	1/23/2014	1
Alvarez, Mike	4/12/2014	5
McNulty, Joe	4/23/2014	9
Roszel, Tom	8/10/2014	3
Taylor, Tim	9/26/2014	3
Muntaner, Quintin	5/16/2015	2
Falk, Peter	6/6/2015	0
Alvarez, Danny	6/17/2015	2

APPENDIX 2

CHART 2: HIRE DATE AND NUMBER OF SHOWS WORKED
FOR STAGEHANDS LISTED IN SETTLEMENT AGREEMENT

MORE SENIORITY/FEWER SHOWS				LESS SENIORITY/MORE SHOWS		
Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015		Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Kelly, Joe	6/30/2002	4		Mangnall, Bryan	10/14/2006	30
Garrity, Tom	1/5/2003	12		Svitek, Lou	7/6/2007	26
Pospishil, Eric	11/2/2003	6		Sikora, Brad	5/16/2009	41
Benson, Brent	6/16/2006	15		Carter, Todd	4/15/2011	20
Lyons, Joe	9/27/2006	2		Mulvey, Mike	4/15/2011	21
Pollak, Martin	10/3/2008	11		Thomson, Gabe	5/13/2011	47
Gunn, Sean	10/30/2010	6		Bilecki, Ed	11/4/2011	46
Fritz, Zach	4/15/2011	10		Chambers, Chris	9/9/2013	20
Peterson, Bertil	5/13/2011	6		Leggett, Chris	9/28/2013	34
Koziol, Cassandra	7/7/2011	1				
Bartolini, James	10/8/2011	4				
Berry, Lester	10/22/2011	4				

CHART 2: HIRE DATE AND NUMBER OF SHOWS WORKED
FOR STAGEHANDS LISTED IN SETTLEMENT AGREEMENT (Cont'd)

MORE SENIORITY/FEWER SHOWS		
Alleged Discriminatee	Hire Date	Number of Shows Worked From September 22, 2014 To September 21, 2015
Dombrovskis, Alek	10/22/2011	8

APPENDIX 3

CHART 3: SUMMARY OF JOINT EXHIBITS 27 AND 28

	Shaw Crew		New Crew	
	#	%	#	%
Offers (Jt. Ex. 27)	371	371 ÷ 688[21] = 54%	317	317 ÷ 688 = 46%
Worked All-Day (Jt. Ex. 28)	69	69 ÷ 144[22] = 48%	75	75 ÷ 144 = 52%
Worked Load-in/Load-out (Jt. Ex. 28)	82	82 ÷ 182[23] = 45%	100	100 ÷ 182 = 55%

21 371 offers to Shaw Crew plus 317 offers to New Crew = 688

22 69 members of the Shaw Crew worked all day and 75 members of the New Crew worked all day = 144

23 82 members of the Shaw Crew worked load-in/load-out and 100 members of the New Crew worked load-in/load-out = 182

APPENDIX 4

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM-16-09 March 9, 2016

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Casehandling Cost Saving Instructions for Remainder of Fiscal Year 2016

As you may know the Agency is facing a significant budget deficit for the remainder of FY 16. Accordingly the entire Agency is carefully reviewing ways in which we can reduce and control spending for the remainder of the fiscal year. This memorandum is directed to the field, but I assure you that more Agency-wide and headquarters cost cutting initiatives are also in the works and will be announced in the near future. I encourage anyone with additional cost cutting suggestions to contact me and all ideas will be carefully considered. We want to ensure that we continue to effectively enforce the National Labor Relations Act and service our stakeholders throughout the year. Towards this end, until further notice, we are instituting in FY 2016 casehandling cost savings measures consistent with those instituted in previous fiscal years, which proved to be effective.

UNFAIR LABOR PRACTICE SETTLEMENTS AND ELECTION AGREEMENTS

The Field continues to enjoy remarkable success in securing settlements of merit unfair labor practice cases and election agreements to resolve pre-election disputes. The salutary effects of ULP settlements in resolving labor disputes and election agreements are obvious and must be pursued. In addition, and of special importance at this time of budget uncertainty, significant savings of Agency staff and budget resources result from high settlement and election agreement rates. It is also true that settlement early in the processing of a merit unfair labor practice case and the prompt negotiation of an election agreement will result in the greatest saving in resources. Accordingly, in all Regional Offices, and especially in those offices where performance in these areas is below the national experience, redoubled efforts should be made to resolve cases. In this regard, training for all professional employees should continue to be conducted on settlement techniques when appropriate, settlement coordinators should be active and Regional Directors should be directly involved in settlement efforts. Please consult Memoranda OM 89-91, dated September 29, 1989; OM 97-81, dated December 9, 1997, and OM 98-33, May 12, 1998. In addition, please provide the name of your settlement coordinator to your AGC or Deputy for our future reference.

TRIALS AND REPRESENTATION CASE HEARINGS, COMMUNICATION WITH DIVISION OF JUDGES

For those trials that will be going forward despite exhaustive settlement efforts, in order to save on transportation and per diem costs for witnesses, pre-trial preparation should be conducted in the Regional Office, by phone, videoconference, if feasible, or in conjunction with other required travel, if at all possible to keep costs to a minimum. Certainly, the trial attorney should meet in person with witnesses at least on two separate occasions prior to the trial, with one occasion scheduled in coordination with travel to the hearing.[1] Witnesses whose presence at trial must be secured by subpoena at government expense should be released as soon thereafter as possible. Other stratagems which may contribute to shorter, more efficiently run trials and representation hearings during the budgetary uncertainty should also be employed:

1. In making assignments for trials and hearings focus on those trials and hearings inside the office to provide inexperienced counsel the opportunity to "second chair" senior counsel as a training exercise. Two attorneys should be assigned to out-of-town cases only in large cases requiring those resources.

2. Avoid additional costs to court reporters and interpreters by providing timely notice of the postponement or cancellation of hearings/trials and avoid overtime costs for court reporters unless overtime will allow the Region to conclude the proceeding.

3. Ensure that when facilities must be rented for hearings, trials or elections the least expensive alternatives that will at the same time suit the Agency's needs are chosen. Contact Facilities for assistance in locating free or low cost rooms.

4. In appropriate cases, where cost savings may be realized, Regions should consider having trial attorneys use oral argument at the end of the hearing in lieu of filing post-trial briefs and encourage administrative law judges to issue bench decisions.

5. Encourage the use of stipulations to reduce the time on the record and conserve resources.

In addition, close communication with the Division of Judges with regard to the amendment of complaints and settlement efforts will ensure the Judges schedule the appropriate number of hearing days and avoid unnecessary trips.

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[1] See ICG-13-04, "FY 2011 Litigation Review and Comprehensive Report on Litigation Wins and Losses," dated December 17, 2012, noting that while generally three meetings with the witness are desirable, there are times when two may be sufficient and other times when more are required. These are matters left to the discretion of the trial attorney in consultation with regional management. Maintaining high quality in our litigation is paramount.

VIDEO TESTIMONY IN ULP PROCEEDINGS

Witness testimony by video in unfair labor practice proceedings before the ALJ has been upheld by the Board in certain circumstances. See NLRB Bench Book, § 12-400. Among those include situations in which the parties have agreed to take testimony in this fashion. Id. Accordingly, even if a witness is available, or there is an insufficient foundation to request video testimony, Regional offices should pursue agreement with the parties to provide for taking testimony by video where it is strategically appropriate. It is of course within the discretion of the Regional Director to make this determination, but we encourage you to consult with your AGC, Deputy or me in making this assessment. Even without agreement, in a recent (admittedly unusual) case, the Board found video testimony appropriate. See *EF Int'l Language Schools, Inc.*, 363 NLRB No. 20 slip op. at n.1 (2015).

INVESTIGATIONS

Alternative Investigatory Techniques - Full use should be made of alternative investigatory techniques. Accordingly, questionnaires, telephone affidavits, videoconference interviews, where feasible, position statements and other techniques that reduce or eliminate the travel costs usually associated with unfair labor practice investigations involving travel outside the commuting area should be employed as appropriate. See Memoranda OM 95-15, dated August 22, 1995, and GC 02-02, dated December 6, 2001.[2] Thus, all Category I and most Category II cases should be investigated consistent with the guidance in those memoranda, unless the case is local or the Regional Director determines that travel is essential to a quality investigation.

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[2] GC 02-02 states, at. p. 3:

Face-to-face affidavits remain the cornerstone of our investigations. Experience has shown, however, that there are also alternative investigative techniques that can save time and resources without adversely affecting quality in certain types of cases. Especially where significant travel would otherwise be involved, such techniques save both considerable time and resources, thereby allowing Board agents to address other matters. While the need to utilize these techniques, such as questionnaires and telephone affidavits, was originally based upon a shortage of casehandling resources, even with adequate resources the use of these techniques in the investigation of certain types of cases should be continued in order to promote both efficiency and economy. In particular, all Regional Offices should utilize alternative techniques for all Category I cases and continue to use them for certain Category II cases, such as a Section 8(a)(5) or 8(b)(3) request for information or a Section 8(b)(1)(A) duty of fair representation allegation, which, as previously noted, will now be placed in Category II. Additionally, consistent with Memorandum OM 99-75, Regional Directors continue to have the discretion to use these techniques for other Category III and II cases, where appropriate. As stated in that memorandum:

> In situations where substantial travel will be necessary, the Regional Directors may exercise their discretion to take telephonic affidavits in circumstances where the affidavit is a supplemental statement, where individuals are providing evidence that corroborates evidence presented in a face-to-face affidavit or where there is a very high probability that the case has no merit.

(Footnotes omitted).

Translations – Use Agency bilingual agents before utilizing the services of our contractor. A list of the Bilingual Field Employee is posted on the Insider.

Time Targets – Make full use of the "cushion" in reaching the Impact Analysis time targets. Understanding that understaffing is a reality in many of our regions, keep in mind that a certain percentage of cases can go overage under those time targets. This will allow for consolidation of travel and hopefully some relief to the staff in casehandling.

TRAVEL

Travel Coordinator - The Travel Coordinator in each Region should continue to manage Regional travel on a daily basis, clustering travel assignments for Board agents and avoiding nonessential travel while ensuring that appropriate, alternative investigative techniques are employed in lieu of travel outside the commuting area whenever possible. Interregional coordination of travel for investigations is encouraged. Travel coordinators in contiguous Regions should be in frequent contact to permit agents traveling in the outskirts of their Regions to assist in investigations or elections in the outskirts of a contiguous region. Use of GSA cars when available and when cost effective should be encouraged. See Memorandum OM 03-98, dated August 1, 2003. When travel by air is absolutely necessary, the most cost efficient arrangements mentioned below should be employed. In addition, where feasible, multiple travel vouchers for local travel should be processed together. This will help reduce voucher transaction fees. Thus, expenses such as mileage, tolls or parking for separate local trips can be combined in one voucher. Local travel vouchers should be processed within 90 days of incurring the expense, and expenses should not be carried across the end of the fiscal year. Note that temporary duty and local travel vouchers cannot be combined on a single voucher.

Notwithstanding the Agency's current budget uncertainty, we must continue to pursue the General Counsel's Outreach Initiative. However, in doing so we must be mindful of the costs involved and the competing demands on our scarce budget resources. Thus, for the time being any request for outreach activities that will cost more than $100 must be directed to Deputy Assistant General Counsel David Kelly. If non-local travel is required for outreach, such travel costs cannot be incurred unless it can be combined with travel for casehandling or is less than $100. Similarly, full advantage should be made of the outreach materials we now have available (see the Outreach Resources link of the Operations page of the "Insider". Finally, if your region produces a newsletter, a practice we strongly encourage, please distribute the newsletter via email and/or your Regional web page.

Use of E2 for Travel Arrangements – All travel arrangements should be made on line through the E2 website. Making travel arrangements in this fashion not only represents a substantial cost savings but also ensures for prompt issuance of your ticket for travel. Fees for booking travel through the Carlson Travel Management Center are more than four times as much those incurred when making the arrangements on line through E2,

and caused the Agency to incur a significant expense in this area last year. Similarly, reservations for lodging and/or car rental should also be made on line through E2. Employees should also be reminded that they can participate in the Gainsharing Travel Savings Incentive Award Program. See APC 00-05.

Travel Responsibilities of the Parties – Except when Board agent travel can be coordinated, or under special circumstances, all institutional charging parties within 120 miles of the field office location should be encouraged to travel to the office to present evidence and give affidavit testimony. It is reserved to the sound discretion of the Regional Director to determine whether Board agent travel should be invested in the investigation where the institutional charging party is unwilling to travel up to 120 miles to the Regional Office. In exercising this discretion, the Director should be sensitive to the hardship such a requirement might impose on certain parties. Charged parties and their witnesses located within 120 miles should be strongly encouraged to travel to the office. If the charged party is unwilling to provide affidavits, the Board Agent should generally not go to the Charged Party's facility, instead requesting video conference interviews and a position statement. Unfair labor practice and representation case hearings should be conducted in the field office in cases involving employers located within 120 miles from the field office city. Regional Office managers must exercise judgment where the presence of witnesses at hearings must be compelled by subpoena and costs associated with subpoenas make the conduct of the hearing in a location remote from the Region cost effective. Use of video conferencing for Representation cases should be considered where travel costs are substantial. See Memorandum OM 11-42 and 08-20.

MAIL, WRITTEN COMMUNICATIONS

Decrease Reliance on Private Delivery Services and Certified Mail - Regions should significantly decrease the use of UPS (unless economically justified) and certified mail, especially for interoffice mail. Eliminate the use of these services if "next day delivery" would mean Saturday delivery. Of course, use of certified mail must still be used insofar as the Rules and Regulations require such service.

Electronic Mail – To the extent not already done, please increase use of E-mail, where appropriate, in place of correspondence to and from Headquarters and between field offices and with the parties, consistent with Memorandum OM 03-74, dated May 6, 2003. Continue to encourage the parties to e-file documents during the course of the investigation.

SUPPLIES

Office supplies and services should be purchased with an Agency Purchase Card pending further instructions. We anticipate that the Acquisitions Management Branch will soon issue a protocol providing for bulk purchases, which will provide a significant cost savings in the purchase of supplies.

PHONES AND PHOTOCOPY EQUIPMENT USE

Phone Lines - Disconnect unused leased phone lines. Phone line costs vary from location to location but average approximately $35.00 per month. Generally, there is no cost to disconnect a phone line, but reactivation costs can be substantial. Thus, the Regions should balance these costs with anticipated savings. If a line is to be unused for at least 4 to 6 months, a net savings to the Agency would result if the line is disconnected, even if a reconnection charge is later incurred. In addition, this would obviate the need to transfer unnecessary lines when Unified Communications is deployed in your Regional office. Contact Rob White, NLRB Telecommunications Specialist, for information specific to your city.

Photocopy Machine Use - Use of office photocopy machines should be prudently monitored and abuse prevented. Because the cost of toner for individual printers is high, encourage the use of the network printer and always default to double sided on both network and personal printers. Double-sided photocopying should be used whenever possible.

PAPER REDUCTION

- Take every opportunity to encourage reduction in the use of paper. When it is used, encourage recycling. To the extent possible, the review of all case files should be conducted on-line and when agendaing cases, participants should use their laptops rather than copying and distributing relevant documents. With the exception of paper documents that are submitted by parties in a case, there should be no paper files.

- Representation Case Decisions, Complaints and Notices of Hearings are often double-spaced. While this is not required by the Agency's rules and regulations, the Board's preference is that these documents be submitted double spaced. However, please consider using single space and double-sided copying for documents that are not filed with the Board or courts.

- Maximize the use of E-mail for interoffice announcements of general interest. E-mail messages relevant to a case investigation should be uploaded into NxGen, rather than printed out.

- Printed copies of official documents such as complaints should be reduced to the minimum number necessary.

- Upload all relevant case handling documents to be submitted to Headquarters into NxGen. If for some reason that is not possible, E-mail all documents submitted to Headquarters.

- When forwarding non-bargaining unit and PMRS appraisals to Headquarters, please continue to place in the E-room. There is no need to provide a separate paper copy.

- When forwarding bargaining unit appraisals to Headquarters, please scan a signed copy and place in the E-room. There is no need to provide a separate paper copy.

- Headquarters offices will continue to distribute documents electronically.

- Notify the parties in our hearings that they should bring sufficient copies of their exhibits.

Vigilance in the management of our limited resources must be maintained if we are to continue to enforce the Act effectively and provide the essential services we perform to the national economy and to individual working people and businesses across the land while avoiding dislocations of our employees. Continuing the casehandling efforts that have resulted in our enviable record of performance will greatly contribute to this effort as well. Hiring opportunities in FY 2016 will likely continue to be extremely limited, so we must carefully manage our resources in order to handle the Agency's caseloads as effectively as possible.

Thank you in advance for your continued cooperation in controlling costs. We appreciate all of your past efforts in controlling costs and will keep you advised of the FY 2016 budget situation as it develops. As noted above, please let us know if you have any cost savings suggestions. If you have any questions about the foregoing, please contact your Assistant General Counsel or Deputy or me.

/s/
A.P.

cc: NLRBU

APPENDIX 5

Holland & Knight

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STEVEN L. GILLMAN
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June 17, 2016

Via Messenger Delivery and Electronic Mail

Mr. Thomas B. Porter
Compliance Officer
National Labor Relations Board
Region 13
219 South Dearborn Street, Suite 808
Chicago, IL 60604

Re: JAM Productions, Ltd. and Event Productions, Inc.
Case No. 13-CA-177838

Dear Mr. Porter:

The following represents the Employer's position statement in response to the referenced Unfair Labor Practice Charge ("Charge").

I. INTRODUCTION

The Charge alleges that the Employer has breached the Settlement Agreement entered into with the Region by discriminating and/or retaliating against the alleged discriminatees by not providing them with "full participation" in the on-call list for stagehand work at the Riviera Theatre because of their support for the union.. The Charge is baseless. The evidence establishes conclusively that the alleged discriminatees have fully participated in the on-call list for work.

Generally, the production manager has *carte blanche* authority to hire whomever he wants to fill the stagehand crew for a show. In this case, the Employer gave the production manager very clear written instructions that he must provide the alleged discriminatees full participation in the on-call list and that union support or membership must not play any role in his hiring decisions. The production manager's call log establishes that he has carried out and fulfilled this responsibility. The log shows that he has typically offered more opportunities to work to the alleged discriminatees compared to the other individuals on the call-out list. The log also shows that the alleged discriminatees are more inclined than the others on the list to decline opportunities to work. Moreover, the payroll sheets establish that the number of hours worked and wages paid to

the alleged discriminatees who accept offers to work are on average higher than the other individuals from the call-out list who work.

For these reasons and the reasons below, the Charge should be dismissed.

II. FACTS

A. Background

Jam Productions, Ltd. ("Jam") is an independent producer of concerts and special events. In the Chicagoland area, Jam rents venues, including the Riviera Theatre. Event Productions, Inc. ("Event Productions") supplies labor to third parties, including Jam and other entities. The stagehands at the Riviera are supplied through Event Productions.[1]

B. The Underlying Unfair Labor Practice Charge

On September 18, 2015, the Union filed an Unfair Labor Practice Charge alleging that the Employer discharged the stagehand crew at the Riviera in retaliation for the employees' protected activity.

The Riviera has stagehands who work each show. The stagehands load in equipment and material from the band and vendors before the show and load-out after the show ends. The stagehands also perform electrical, carpentry, and other work, and provide lighting technicians, audio technicians, and video technicians as needed. The size of the stagehand crew for a particular show, and the types of workers assigned to the crew, vary depending upon the scope of work for the show. The venue's production manager initially will review the Rider attached to the contract between Jam and the band. The Rider details the equipment, material, lighting, audio, video, and other requirements for the performance. The production manager then collaborates with the tour's manager to finalize the size of the stagehand crew and the types of workers assigned to the crew.

Prior to the terminations at issue in the underlying Charge, Chris "Jolly Rogers" Shaw hired the crew for the Riviera shows from a list of stagehand contacts he maintained. Shaw was solely responsible for selecting, assigning, and supervising his crew for each show. There was no review or oversight of his decisions to fill the crew. He could try out and use new individuals in his sole discretion or stop using individuals in his sole discretion. If he did not like a stagehand, or the stagehand was unsatisfactory for any reason, he was free to stop using the individual. While Shaw had his own "go to" or regular stagehands, the crews changed based upon availability because shows are scheduled sporadically and individuals may have scheduling conflicts because of other jobs and commitments. At the end of a show, Shaw submitted a pay sheet to Event Productions itemizing the hours worked for each member of his crew. Shaw's last show worked was September 21, 2015. He was replaced by Behrad Emami.

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[1] The Charge identifies Jam Productions, Ltd. and Event Productions, Inc., as a single employer for the stagehands at the Riviera Theatre. The charged parties dispute that Jam Productions, Ltd. and Event Productions, Inc., are a single employer. The employees were all employed by and on the payroll of Event Productions, Inc.

C. The Settlement of the Underlying Unfair Labor Practice Complaint

The Charged Parties signed the Settlement Agreement on March 28, 2016. The Region signed the Agreement on April 6, 2016. The Union refused to sign the Settlement Agreement and, accordingly, the settlement was taken "unilaterally" by the Region. Upon information and belief, the Union refused to sign the Settlement Agreement because it would not agree to the very language at issue in this Charge. The Union insisted that the Settlement Agreement state that Jolly's crew have full participation in the on-call list with all of their seniority or any other rights and/or privileges previously enjoyed. The Charged Parties would not agree to a settlement that gave Jolly's crew any special rights or privileges other than full participation without discrimination because of their Union support or membership. The additional language sought by the Union conferring rights and/or privileges previously enjoyed by Jolly's crew was struck from the final Agreement.

D. The Relevant Portions of the Settlement Agreement

The Settlement Agreement includes a non-admission clause. It states that "[b]y entering into this Settlement Agreement, the Charged parties do not admit to having violated the Act." It includes an Attachment A itemizing the back-pay amount for the individuals who the Union claimed were on Jolly's stagehand contact list. There are 44 employees named on Attachment A, with 4 employees receiving the bulk of the back-pay: 1) Justin Huffman; 2) Gregor Kramer; 3) Paul Repar; and 4) Archie Yumping. Finally, and most important for purposes of this Charge, the Settlement Agreement states that the charged parties will offer these individuals "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015, or if those jobs no longer exist, to substantially equivalent positions, without discrimination because of their Union membership or their support for the Union, and offer them work in a non-discriminatory manner."

E. Compliance With the Settlement Agreement

Behrad Emami has his own list of stagehand contacts and regular "go to" stagehands. Like Jolly, he has complete discretion to decide whom to call to fill a stagehand crew for a show. To ensure that Emami fully understood and complied with the Settlement Agreement, he was given a memo on March 28, 2016 stating exactly what he had to do to comply. A copy of the memo is attached as Exhibit 1. The memo states that "effective now, you, as the person who hires the stagehands for the Riv (and anyone else who performs that function) will offer Jolly Rogers' former crew (names are listed below) immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015 ... without discrimination because of their Union membership or support for the Union, and offer them work in a non-discriminatory manner." The memo provided specific direction as follows:

> I want to emphasize to you that this is your responsibility, and that I expect you to carry it out completely and in every way. It is very important to me and to the companies that you do so. If you have any questions about what this means or how to do what I am

> requiring, then please let me know. To be clear, you may hire whomever you think is best and appropriate for jobs. But union support or membership, or lack of support or membership in the union, may not play *any* role – NONE – in the hiring decisions you make. *And,* you have to give fair consideration to Jolly's former crew. No doubt you have people whom you're now using whom you know and trust. But in order to be fair to Jolly's former crew, I want you to make sure that you give people a chance – especially people who were most active in working Riv shows before September 21, 2015. (The first list below shows those who were most active at the Riv.) In order to show your and our good faith in this, I would like you to make a particular effort to choose among Jolly's former crew as stagehands for the immediately upcoming Riv shows on April 1 (if possible), 7, 14, 15 and 16. That will both help you get to know people you may not know, and will show that you and the companies are taking our obligation seriously. To be clear, though, this isn't just an April 2016 obligation. You must make sure that you *continue* to hire stagehands in a completely non-discriminatory manner.

Mr. Emami was directed to "keep a record of every offer of work at the Riv that you make."

During the first week of April 2016, Mr. Emami contacted members of Jolly's crew (the alleged discriminatees) to work the Riv show on April 7, 2016, and he continued to contact them to work each and every show at the Riv since then. Per the memo, Mr. Emami has kept a log reflecting the name of each person he contacted to work a show, how he contacted the individual (text or call), the date and time of the contact, whether he succeeded in making contact, and the individual's response. The call log is attached as Exhibit 2. The individuals highlighted in yellow are the stagehands from Jolly's crew who were eligible to vote in the election because they worked at least 18 shows during the preceding year. The individuals highlighted in green are also members of Jolly's crew, but they worked irregularly, and were not eligible to vote in the election because they had not worked 18 or more shows during the preceding year. The individuals whose name has no highlight are other individuals from Mr. Emami's contact list, including the individuals he previously used on a regular basis.

The call log confirms that the employees named as discriminatees in the Settlement Agreement have been offered "full participation in the on-call list" and have not been subjected to discrimination of any kind. In fact, these records reflect that the employees named as discriminatees have, if anything, received preferential treatment. The March 28, 2016 Memo stated that in order to show good faith Mr. Emami should "make a particular effort to choose among Jolly's former crew as stagehands for the immediately upcoming Riv shows ..." Beginning with the show on April 9 the alleged discriminatees were typically contacted to work more often than members of Mr. Emami's own crew (the alleged discriminatees were offered the opportunity to work April 7, but declined because they thought the settlement agreement was not finalized).

The log reflects that a higher number of Jolly's crew were contacted to work shows on April 9, April 14-15, April 28, April 29, May 5, May 13, May 19-20, and June 10.[2] More of the other crew members were contacted to work shows on April 16, May 28, June 3, and June 9.

The pay sheets reflecting each crew member's hours worked and pay rate are attached as Exhibit 3. The pay sheets reflect that the members of Jolly's crew have sometimes filled half the slots for a show and sometimes slightly less than half the slots for a show. Again, while members of Jolly's crew have typically been contacted more often than other individuals on the call-out list to work shows, the members of Jolly's crew are more apt to decline opportunities to work. When they do work, the pay sheets establish that members of Jolly's crew are just as likely as other crew members to work "all day" as opposed to just load-in or load-out work. Finally, the pay sheets establish that most members of Jolly's crew are paid at the higher end of the wage scale, $20.00 per hour. The only stagehand paid at a higher rate, John Booher, the stage manager, was challenged by the Union on the ground that he is a supervisor.

III. LEGAL ANALYSIS

The Settlement Agreement was intensely negotiated. It contains a non-admissions clause. It provides the alleged discriminatees "full participation" in the on-call list for stagehand work at the Riviera without any rights or privileges other than the right not to be discriminated against because of their support for the Union. It plainly does not provide the alleged discriminatees either exclusive participation or preferential participation in the on-call list. It does not provide them any special privileges of any kind.

The Union refused to sign the Agreement for this very reason. It insisted that the Agreement restore the alleged discriminatees' seniority and other rights and/or privileges they previously enjoyed. The Employer refused to agree to this or any similar-type language. This Charge is nothing more than a transparent attempt by the Union to obtain what it could not obtain during settlement negotiations.

The attached material establishes conclusively that the alleged discriminatees have been afforded "full participation in the on-call list" and have not been discriminated against in any manner. The Employer provided clear direction in writing to Mr. Emami to ensure that he understood that he was required to provide full participation in the on-call list to Jolly's crew. The memo identified by name the alleged discriminatees who needed to be afforded full participation. The memo made clear that union support or membership must not play any role in Mr. Emami's hiring decisions. Mr. Emami's crew call log establishes conclusively that he has afforded Jolly's crew "full participation" on the call-out list without discrimination. In fact, to fill-out the crew Mr. Emami has typically contacted more members of Jolly's crew to work shows than other individuals in the on-call list. The evidence is that members of Jolly's crew are more inclined than other individuals to decline opportunities to work. And when they do work, the payroll sheets establish that the members of Jolly's crew are just as likely as the other

[2] Of the 22 members of Jolly's crew who were eligible to vote in the election (all did vote), the only individual who has not been contacted to work is Brent Benson. Mr. Benson has been unable to work for medical reasons.

members of the crew to work more hours. Finally, the payroll sheets establish that most members of Jolly's crew receive comparable or higher wages than the other crew members.

IV. CONCLUSION

For the foregoing reasons, the Charge should be dismissed. If you require any further information, please contact me.

Very truly yours,

Steven L. Gillman

SLG/ddlc

cc: Shayle Fox, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAM PRODUCTIONS, LTD. and EVENT PRODUCTIONS, INC.

and **Case No. 13-CA-177838**

THEATRICAL STAGE EMPLOYEES UNION LOCAL NO. 2, IATSE

CERTIFICATE OF SERVICE

I, the undersigned attorney, being duly sworn, state that on July 10, 2017, I had served the **Respondents' Brief In Support Of Their Exceptions To The Decision Of The Administrative Law Judge** upon the following:

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